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Supreme Court of the United States

October Term, 1963

No. [redacted] 152

AMPCO PRINTING-ADVERTISERS' OFFSET CORP., THE KATZ PARKING SYSTEM, INC. and THE GEORGIAN PRESS, INC.,

Plaintiffs-Appellants,

against

THE CITY OF NEW YORK, ROBERT F. WAGNER, as Mayor of the City of New York, ABRAHAM D. BEAME, as Comptroller of said City, and HILDA G. SCHWARTZ, as Director of Finance of said City,

Defendants-Respondents.

LOUIS J. LEFKOWITZ, as Attorney-General of the State of New York,

Intervenor-Respondent.

On Appeal from the Court of Appeals of the State of New York

JURISDICTIONAL STATEMENT

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Supreme Court of the United States

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ON APPEAL FROM THE COURT OF APPEALS OF THE STATE OF NEW YORK

JURISDICTIONAL STATEMENT

(a) Proceedings and reports of the opinions in the courts below.

This action was brought in the Supreme Court of the State of New York, County of New York. Appellants' motion for summary judgment was denied, and defendants-respondents' motion for summary judgment in opposition thereto was granted. The opinion of the New York Supreme Court is reported *sub. nom. Robert B. Blaikie & Co.* v. *City of New York* (a companion case in the lower courts), at 41 Misc. 2d 371, 245 N. Y. S. 2d 121.

Appellants appealed directly on constitutional grounds (Section 5601(b)2 of the Civil Practice Law and Rules of the State of New York) to the Court of Appeals of the State of New York from the judgment denying appellants' motion and granting defendants-respondents' motion. The Court of Appeals affirmed the judgment below. The opinion of the Court of Appeals is reported at 14 N. Y. 2d 11, 197 N. E. 2d 285.

Copies of the above two opinions are annexed hereto as Appendix A (pp. 11-25).

(b) Grounds on which jurisdiction of the Supreme Court of the United States is invoked.

(i) The action in the State Court was instituted, among other things, to have Local Law 38, of the City of New York, of 1963 (hereinafter sometimes referred to as the "Local Law") and the Enabling Act, Chapter 257, of the Laws of 1963, of the State of New York (hereinafter sometimes referred to as the "Enabling Act"), declared unconstitutional, illegal, invalid, null and void and violative of Section One of the Fourteenth Amendment to the Constitution of the United States and for the appropriate incidental relief. Other grounds of unconstitutionality were also claimed, but as they were based on the New York State Constitution, they are not relevant here. The action was brought pursuant to Section 473 of the Civil Practice Act of the State of New York (predecessor to Section 3001 of the Civil Practice Law and Rules of the State of New York, effective September 1, 1963), which relates to declaratory judgments.

(ii) The final judgment and order of the Court of Appeals of the State of New York sought to be reviewed was made and entered on February 20, 1964; and the final judgment of the Supreme Court of the State of New York, County of New York, based upon the aforesaid final judgment and order, was made and entered on March 26, 1964. Copies of the above judgments and order are annexed

hereto as Appendix B (pp. 26-31). The notice of appeal to the Supreme Court of the United States was filed with the Clerk of the Supreme Court of the State of New York, County of New York, on April 7, 1964, and was filed with the Clerk of the Court of Appeals of the State of New York, on or about April 7, 1964.

(iii) The jurisdiction of the Supreme Court of the United States to review the aforesaid judgments and order by appeal is conferred by Title 28, United States Code, Section 1257(2).

(iv) The following decisions sustain the jurisdiction of the Supreme Court of the United States to review the aforesaid judgments and order by appeal: *Phillips Co.* v. *Dumas School Dist.*, 361 U. S. 376 (1960); *Hartford Co.* v. *Harrison*, 301 U. S. 459 (1937); *Louisville Gas Co.* v. *Coleman*, 277 U. S. 32 (1927); and see *Moses Lake Homes* v. *Grant County*, 365 U. S. 744 (1961), rehearing denied 366 U. S. 947 (1961); *Morey* v. *Doud*, 354 U. S. 457 (1956); *Quaker City Cab Co.* v. *Penna.*, 277 U. S. 389 (1927).

(v) The validity of the Local Law, and of the Enabling Act, is involved. The texts of the Local Law and Enabling Act are annexed hereto as Appendix C (pp. 32-60). Although the text of the Local Law in the Administrative Code of the City of New York, Chapter 46, Title L, is not yet published, the text of the Local Law may be found at 4 C.C.H. N. Y. STATE TAX REP. § 192-807. The text of the Enabling Act may also be found at McKinney's Unconsolidated Laws of the State of New York, Section 9447 (Supplement 1963).

(c) Questions presented by the appeal.

(i) Whether the Local Law and the Enabling Act, so arbitrarily, capriciously, unreasonably and wrongfully discriminate between persons engaged in the same commercial activity by imposing the so-called rent and occupancy tax on appellants Ampco Printing-Advertisers' Offset Corp. and The Katz Parking System, Inc. (hereinafter

sometimes referred to as "Ampco" and "Katz", respectively) while exempting the City of New York and other competitors of Ampco or Katz; as to violate Section One of the Fourteenth Amendment to the Constitution of the United States.

(ii) Whether the Local Law and the Enabling Act so arbitrarily, capriciously, unreasonably and wrongfully discriminate between tenants who are subject to the tax by imposing a tax upon tenants who have a base rent not in excess of $2,500 per annum at a rate of 2½% thereof, while also imposing a tax upon tenants such as Ampco and Katz and others whose base rent is in excess of $2,500 per annum at a rate of 5%, including a tax on the first $2,500 at a rate of 5%, as to violate Section One of the Fourteenth Amendment to the Constitution of the United States.

(iii) Whether the Local Law and the Enabling Act so arbitrarily, capriciously, unreasonably and wrongfully discriminate between tenants such as Ampco and Katz who rent for the purpose of carrying on commercial activities and tenants who rent for residential purposes, as to violate Section One of the Fourteenth Amendment to the Constitution of the United States.

(d) Statement of the case.

On May 21, 1963, and purportedly pursuant to the Enabling Act, the Council of the City of New York enacted the Local Law which seeks to impose a tax on the use or occupancy of rented premises in New York City, occupied, used or intended to be occupied or used for the purpose of carrying on or exercising any trade, business, profession, vocation or commercial activity. The aforesaid tax is imposed on commercial tenants who have a "base rent", as defined in the Local Law, not in excess of $2,500 per annum, at a rate of 2½% thereof, and on such tenants who have a "base rent" in excess of $2,500, at a rate of 5% thereof, including the first $2,500 thereof. On May 29, 1963, the Local Law was approved by defendant, Robert

F. Wagner, as Mayor, and by its terms became effective on June 1, 1963.

Appellant Ampco is a New York corporation, which prior to the enactment of the Enabling Act and Local Law was, and presently is, engaged in the business of color lithography and printing which it carries on at premises in New York City occupied by it as tenant pursuant to a written lease. Pursuant to the provisions of the Local Law, Ampco is subject to a tax (hereinafter sometimes referred to as the "occupancy tax") of $3,186.06 per annum (5% of the annual rent). Ampco is in direct competition with other persons in the same business who own the premises in New York City they use for such activity, including, for example, appellant The Georgian Press, Inc., and who are exempt from payment of the occupancy tax, solely by reason of said ownership.

Appellant Katz is a New York corporation, which prior to the enactment of the Enabling Act and Local Law was, and presently is, engaged in the business of operating a public parking facility which it carries on at premises in New York City occupied by it as tenant pursuant to a written lease. Pursuant to the provisions of the Local Law, Katz is currently subject to an occupancy tax of $3,600 per annum (5% of the annual rent). Katz is in direct competition (a) with other persons in the same business who own the premises in New York City they use for such activity and who are exempt from payment of the occupancy tax solely by reason of said ownership, and (b) with the City of New York which operates parking lots in competition with Katz and does not pay said tax.

The federal questions sought to be reviewed were raised by appellants in the state courts as follows: Appellants' complaint alleged that the Enabling Act and the Local Law were violative of Section One of the Fourteenth Amendment to the Constitution of the United States. More specifically, appellants alleged as follows:

> "Twenty-fifth: Furthermore, the aforesaid Enabling Act and Local Law are unconstitutional, ille-

gal, invalid and unjust in that, among other things, they violate Amendment XIV, Section 1, of the Constitution of the United States of America and Article 1, Sections 6 and 11, of the Constitution of the State of New York in that, among other things, they arbitrarily, capriciously, unreasonably and wrongfully discriminate between persons engaged in the same profession, business or other commercial activity and impose and permit the imposing of an unfair and unreasonable burden on plaintiffs Ampco Printing-Advertisers' Offset Corp. and The Katz Parking System, Inc. (hereinafter sometimes referred to as 'the tenant plaintiffs') and other persons who rent premises while exempting the City of New York and other competitors of such tenants engaged in the same activity in New York City who own the premises used for such activity; and further in that they arbitrarily, capriciously, unreasonably and wrongfully discriminate between tenants who are subject to the tax in that tenants who have a base rent not in excess of $2500 per annum are taxed at the rate of 2½% thereof, whereas tenants such as the tenant plaintiffs herein and others whose base rent is in excess of $2500 per annum must pay a tax on the first $2500 at the rate of 5% per annum; and further in that they arbitrarily, capriciously, unreasonably and wrongfully discriminate between tenants such as the tenant plaintiffs herein who rent for residential purposes; by reason of which plaintiffs are and will be deprived of property without due process of law and denied the equal protection of the law."

The Supreme Court of the State of New York, County of New York, per Postel, *J.*, upon appellants' motion for summary judgment, expressly passed upon certain of the questions raised by granting defendants-respondents' motion and denying appellants' motion, thereby upholding the constitutionality of the Enabling Act and Local Law (Appendix, pp. 15-17). The Court expressly rejected appellants' contention that the Enabling Act and Local Law discriminated unconstitutionally between the two classes of commercial tenants subject to the occupancy tax as to the

rates imposed upon each of them respectively (Appendix, p. 17). The Court did not discuss in its opinion the remaining two contentions of appellants in support of their position that the Enabling Act and Local Law are unconstitutional, namely: the occupancy tax discriminates (1) between commercial tenants and commercial owners (including the City of New York), and (2) between commercial tenants and residential tenants. However, the latter two issues were squarely raised and the Court necessarily passed upon and rejected those contentions.

The Court of Appeals of the State of New York necessarily passed upon the federal questions involved by affirming the decision of the Supreme Court of the State of New York. Appellants expressly argued in their brief in the Court of Appeals that the Local Law and Enabling Act discriminate unconstitutionally between commercial tenants and commercial owners (including the City of New York). The Commerce and Industry Association of New York, Inc., as *amicus curiae*, expressly argued in their brief in the Court of Appeals that the Local Law and Enabling Act discriminate unconstitutionally between the two classes of commercial tenants subject to the occupancy tax as to the rates imposed upon each of them respectively. The Court of Appeals expressly rejected these two contentions, holding:

> "[T]he distinction drawn between owners and tenants—or between tenants paying an annual rental of $2,500 or less and those paying more—may not be considered arbitrary or violative of the equal protection clause of the Federal or State Constitution * * *." (Footnote omitted). (Appendix, p. 25).

(e) The Federal questions are substantial.

It has long been settled that a statute which discriminates between two situations which do not differ significantly with reference to the purpose of the statute, violates the equal protection of the laws clause and is unconstitutional and void.

This Court stated in *Royster Guano Co.* v. *Virginia*, 253 U. S. 412, 415 (1919):

> "[C]lassification [for the purposes of legislation] must be reasonable, not arbitrary, and must rest upon some ground of difference having a fair and substantial relation to the object of the legislation, so that all persons similarly circumstanced shall be treated alike."

Accord: Hartford Co. v. *Harrison*, 301 U. S. 459, 461 (1937); *Quaker City Cab Co.* v. *Penna.*, 277 U. S. 389, 400 (1927); *Louisville Gas Co.* v. *Coleman*, 277 U. S. 32, 37 (1927).

While for a period now extending for several decades this principle has been restricted to a narrow scope, it still has validity in the field in which it properly applies. See, *e.g.*, *Moses Lake Homes* v. *Grant County*, 365 U. S. 744 (1961), *rehearing denied* 366 U. S. 947 (1961); *Phillips Co.* v. *Dumas School Dist.*, 361 U. S. 376 (1960); *Morey* v. *Doud*, 354 U. S. 457 (1956).

Thus in *Morey* v. *Doud, supra*, the Court said (p. 465):

> "[A] statutory discrimination must be based on differences that are reasonably related to the purposes of the Act on which it is found." (Footnote omitted).

Avowedly, the sole purpose of the occupancy tax is to raise revenue; and no one questions that this is indeed its real purpose. From that point of view, what is the rational basis for a distinction between the premises occupied for business purposes by a tenant of the premises, and premises occupied for business purposes by the owner of the premises? None has thus far been suggested.

Any claim that a rational basis for the distinction is that owner-occupants pay a real estate tax while tenant-occupants do not, is met by the fact, conceded by the defendants-respondents on the argument* in the Court of

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* See also defendants-respondents' brief in the New York Court of Appeals (p. 22), in which this proposition was expressly assumed to be correct.

Appeals, that the real estate tax is absorbed by the rent paid by the tenants and that the economic impact of a real estate tax and the economic impact of a tax on occupancy are identical.

In truth and in fact the real reason for the exclusion of owner-occupied premises from the tax is that, if they had been included, it would become apparent that the tax is in reality a tax on real property, and that as such, it would bring the total of such taxes over the constitutional limitation imposed on such taxes by Article VIII, Section 10, of the Constitution of the State of New York (Appendix D, pp. 61-63), and the tax would hence be void. These considerations may explain why a local government in search of new sources of revenue might, by the exclusion of certain situations (*viz.*, owner-occupied premises) bearing no rational difference in relation to the purpose of the statute from those *included*, seek to save the validity of what would, if those situations were included, bring the tax clearly within the ambit of the clause of the State Constitution limiting taxes on real estate; but this is not a rational basis for discrimination within the meaning of the equal protection of the laws clause of the Constitution of the United States.

This Court has held in a number of cases (*Union Bank & Trust Co.* v. *Phelps*, 288 U. S. 181, 186-187 (1933); *Packer Corporation* v. *Utah*, 285 U. S. 105, 109-110 (1932); *Raley & Bros.* v. *Richardson*, 264 U. S. 157 (1924)) that where there is a constitutional prohibition against the taxation of certain situations, it does not constitute denial of the equal protection of the laws to tax other situations as to which there is no such constitutional prohibition. These decisions are inapposite here. In the instant case, there is no constitutional prohibition against the taxation of owner-occupied property. The difficulty sought to be avoided by imposing a tax on tenant-occupied property only, was not any difficulty connected with the imposition of a tax on owner-occupied property as such. The difficulty sought to be avoided was that if the tax were generally applied to *all* real property, that is, both tenant and owner-

occupied, it would then become apparent beyond question that the tax was indeed a tax on real property exceeding the limitation in the New York State Constitution upon such a tax (New York State Constitution, Article VIII, Section 10) and that it was hence repugnant to the Constitution of the State of New York and void. This is quite different from the situation presented in the cases cited at the beginning of this paragraph. It is submitted that the principle of those cases is wholly inapplicable here.

This case would appear to be one of first impression for this Court. Neither counsel for appellants nor for defendants-respondents has found any indication that a tax similar to the occupancy tax involved here has ever been imposed in the United States.

This proceeding is not without public importance. It is estimated that the occupancy tax will presently yield approximately $68,000,000 annually to the City of New York and will affect a vast majority of the real property in the City of New York leased for commercial purposes. Perhaps more importantly, other states, to which the occupancy tax holds forth the promise of heretofore untapped sources of revenue, may model similar taxes upon it.

Appellants have addressed themselves herein to the first question presented (pp. 3, 4, *supra*). Appellants expressly reserve the right to present in their brief, on the merits, their arguments addressed to all three of the questions presented.

We believe that the questions presented by this appeal are substantial and that they are of public importance. This Court should, we submit, note probable jurisdiction of the case.

Respectfully submitted,

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Dated: June 1, 1964.

APPENDIX A

Opinion of New York Supreme Court, in Companion Case

GEORGE POSTEL, J. Motions numbered 44 and 107 are consolidated herewith. All parties move for summary judgment in their favor. The actions are for a declaratory judgment declaring that chapter 257 of the Laws of 1963, the enabling act for the New York City Commercial Rent or Occupancy Tax, and Local Law No. 38 for 1963, the local law imposing the tax, are void, unconstitutional and ineffectual.

Chapter 257 of the Laws of 1963 enabled any city having a population of 1,000,000 or more to impose and collect taxes on rent or occupancy. Pursuant to this statute, the City of New York enacted Local Law No. 38 for the year 1963, imposing a tax on use or occupancy. This law provides that every tenant of taxable premises is required after June 1, 1963, to pay a tax of 2½% of his base rent where his base rent is not in excess of $2,500 per year, or 5% of his base rent where his base rent is in excess of $2,500 per year (Administrative Code of City of New York, § L46-2.0, subd. [a].) Taxable premises are defined as: "Any premises in the city occupied, used, or intended to be occupied or used for the purpose of carrying on or exercising any trade, business, profession, vocation or commercial activity, including any premises so used even though it is used solely for the purpose of renting, or granting the rights to occupy or use, the same premises in whole or in part to tenants; except premises within the area leased by the City of New York to the New York World's Fair 1964-1965 Corporation pursuant to chapter four hundred twenty-eight of the laws of nineteen hundred sixty, as amended during the period of such lease." (Administrative Code, § L46-1.0, subd. 5.)

The plaintiff contends that the tax is unconstitutional, based principally on the grounds that it: (1) imposes a

real estate tax which exceeds the limit set forth in section 10 of article VIII of the New York State Constitution; (2) imposes an *ad valorem* tax in violation of section 3 of article XVI of the New York State Constitution; (3) violates the "Due Process" and "Equal Protection" clauses of the Fourteenth Amendment of the Constitution of the United States.

"Every legislative enactment carries a strong presumption of constitutionality including a rebuttable presumption of the existence of necessary factual support for its provisions * * *. Courts strike down statutes only as a last resort (*Matter of Ahern* v. *South Buffalo Ry. Co.*, 303 N. Y. 545, 555, affd. 344 U. S. 367) and only when unconstitutionality is shown beyond a reasonable doubt [citations]." (*Defiance Milk Prods. Co.* v. *Du Mond*, 309 N. Y. 537, 540-541; *Matter of Hotel Assn. of N. Y. City* v. *Weaver*, 3 N Y 2d 206, 216.)

The plaintiff's arguments can best be considered in the order in which they are raised.

Section 10 of article VIII of the State Constitution provides that the amount to be raised by tax on real estate by the City of New York shall not exceed an amount equal to 2½% of the average full valuation of taxable real estate of the city. The plaintiff contends that the tax herein is one imposed on real estate, and, when added to the tax already imposed on assessed valuation, the amount thus raised would exceed the constitutional limitation. The Commercial Rent or Occupancy Tax, as heretofore stated, is imposed on a tenant of a taxable premise according to his base rent for the tax year. The ordinance defines "tenant" as anyone who pays rent for premises as a lessee, sublessee, licensee or concessionaire (Administrative Code, § L46-1.0, subd. [3]). The issue is whether such tax can be construed as constituting a tax on real estate within the meaning of the article. I find that they do not. Leaseholds are not considered to be real property under the

Real Property Tax Law (§ 102, subd. 12). This question was fully discussed by the Court of Appeals in the *Matter of Fort Hamilton Manor* v. *Boyland* (4 N Y 2d 192), where it was unequivocally held that a leasehold interest constituted personal property. Judge VAN VOORHIS, writing for a unanimous court, stated (p. 197): "Under a long line of New York decisions, the interest of a tenant of realty under a real estate lease is not realty but is a chattel real which is personal property [citations]. The most recent expression of this court upon the point is in *Matter of Grumman Aircraft Eng. Corp.* v. *Board of Assessors* (2 N Y 2d 500, 507), where it was said: 'It is significant to note that nowhere in the Tax Law has the Legislature characterized a leasehold as taxable real property. Such omission is understandable, as a lease for years is deemed personalty [citations].' "

Plaintiff's contention that the city treats leases as real property is without merit. The definition relied on is only for the purposes of assessable improvements (Administrative Code, § 291-1.0), and " 'assessable improvement' means any public betterment involving either a physical improvement or the acquisition of real property for a physical improvement" (Administrative Code, § 291-1.0, subd. 1). An assessable improvement is merely a levy for local improvements and not a tax (see *Knickerbocker Vil.* v. *Reid*, 281 N. Y. 861 and *Cooper Union* v. *City of New York*, 272 App. Div. 438, affd. 298 N. Y. 578). The definition of real property contained in subdivision 12 of section 981-1.0 of the Administrative Code in no way sustains the plaintiff's position. It is clear that the tax in question does not constitute a tax on real estate, and therefore does not violate the provisions of section 10 of article VIII of the State Constitution.

The second point raised is that the tax violates section 3 of article XVI of the State Constitution in that it is an *ad valorem* tax on intangible personal property. This

section is concerned with "moneys, credits, securities and other intangible personal property". This contention is without merit, as this section deals with a particular kind of intangible personal property not applicable here. The same rules apply to the construction of a Constitution as to that of statute law (*Matter of Wendell* v. *Lavin*, 246 N. Y. 115, 123). Under the rule of *ejusdem generis*, where "a statute enumerates several classes of persons or things, and immediately following and classed with such enumeration the clause embraces 'other' persons or things, the word 'other' will generally be read as 'other such like'" (McKinney's Cons. Laws of N. Y., Book 1, Statutes, § 239; *Matter of Bowen* v. *Allen*, 17 A D 2d 12). The intangible personal property referred to must therefore be construed as meaning intangibles similar to moneys, credits and securities. The rule of *ejusdem generis*, however, is a rule of construction, which must yield to the Legislature's evident purpose in enacting statutes and should be construed to carry out the objects sought to be accomplished by them (*Matter of Blatnicky* v. *Ciancimino*, 1 A D 2d 383, affd. 2 N Y 2d 943). On this point the intent of the constitutional convention was clearly set forth by Senator Saxe, who, as chairman of the committee proposing this provision, stated: "we can reap, maintain, conserve and reap a further benefit from assuring to people of other states that they can keep their money and their securities in the State of New York, and until they employ them in business in the State of New York they are not going to be subjected to taxation merely by sending it here and leaving it here • • • and that is the underlying purpose of Section 3; that is, at least of the first sentence" (N. Y. State Constitutional Convention, 1938, Revised Record, vol. 2, p. 1113). Under both the rule of *ejusdem generis* and the intent of the constitutional convention, the personal property taxed here does not fall into the category of "moneys, credits, securities and other intangible personal property" as set

forth in section 3 of article XVI. In any event the tax is neither an *ad valorem* tax nor an excise tax levied solely because of ownership or possession. A tax on a tenant based on the rent paid by him is not a tax based on the value of the leasehold; the true value of a leasehold is its market value (*Esso Std. Oil Co.* v. *State of New York*, 10 A D 2d 760; *Matter of City of New York* [*Wetmore*], 272 App. Div. 826; *People ex rel. U. S. Rubber Co.* v. *Knapp*, 232 N. Y. 153, 160). Further this tax applies only to taxable premises, that is, when premises are "occupied, used or intended to be used for the purpose of carrying on or exercising any trade, business, profession, vocation or commercial activity" (Administrative Code, § L46-1.0, subd. 5); and the tax is not levied solely because of ownership or possession. The purpose of section 3 of article XVI was to make it impossible for the Legislature to levy an excise tax on mere possession. "In other words, the property may enjoy that privilege or it may be used for some purpose, and then you can levy an excise tax on it if and when it is used" (N. Y. State Constitutional Convention, 1938, Revised Record, vol. 2, pp. 1114-1115).

The plaintiffs' third contention is that the tax violates the Fourteenth Amendment of the United States Constitution in that it: (1) applies only to cities of 1,000,000 or more; (2) establishes an artificial and arbitrary distinction for the purposes of imposing a tax upon tenants paying an annual rental of $2,500 or less and tenants paying over $2,500; (3) imposes a tax on tenants and not on the owner of the premises, who is also a lessee therein. The issues raised are not novel in the field of taxation and have been passed on many times. The rule was best set forth in 1906 by the Court of Appeals in the case of *People ex rel. Hatch* v. *Reardon* (184 N. Y. 431). Judge VANN, writing for the court, stated (p. 443):

"The right to tax is not granted by the Constitution but of necessity underlies it, because government could not

exist or perform its functions without it. While it may be regulated and limited by the fundamental law, it exists 'independently of it as a necessary attribute of sovereignty.' (*People* v. *Adirondack Ry. Co.*, 160 N. Y. 225, 236.) 'The power of taxation being legislative, all the incidents are within the control of the legislature. The purposes for which a tax shall be levied; the extent of taxation; the apportionment of the tax; upon what property or class of persons the tax shall operate; whether the tax shall be general or limited to a particular locality, and in the latter case, the fixing of a district of assessment; the method of collection, and whether a tax shall be a charge upon both person and property, or only on the land, are matters within the discretion of the Legislature and in respect to which its determination is final.' (*Genet* v. *City of Brooklyn*, 99 N. Y. 296, 306.)

"A tax may be imposed only on certain callings and trades, for when the state exerts its power to tax it is not bound to tax all pursuits or all property that may be legitimately taxed for governmental purposes. It would be an intolerable burden if the state could not tax any property or calling unless at the same time it taxed all property or all callings. (*Connolly* v. *Union Sewer Pipe Co.*, 184 U. S. 540, 562; *Armour Packing Co.* v. *Lacey*, 200 U. S. 226, 235.)"

(Approved *People ex rel. Farrington* v. *Mensching*, 187 N. Y. 8, 16; see, also, *Steuben Rests.* v. *City of New York*, 202 Misc. 22; *O'Gara* v. *Joseph*, 202 Misc. 28.)

The Legislature acted within its powers in restricting the tax to cities having a population of 1,000,000 or more; for "Legislation, embodying discrimination between metropolitan centers and other less populated areas, has been sustained as against the claim of violation of constitutional rights and unjust legislation" (*Southern Blvd. R. R. Co.* v. *City of New York*, 86 F. 2d 633, 635, cert. den. 301 U. S. 703).

Neither did the Legislature exceed its powers in providing for a higher tax on rentals in excess of $2,500. The Court of Appeals in the case of *Vaughan* v. *State of New York* (272 N. Y. 102, app. dsmd. 300 U. S. 638) held constitutional a stock transfer tax of 1½ cents a share for stocks sold for less than $20 and 2 cents a share for stocks selling at a higher price (see, also, *Metropolis Theatre Co.* v. *Chicago*, 228 U. S. 61; *Ohio Oil Co.* v. *Conway*, 281 U. S. 146).

The imposition of a tax can never be popular with those who must pay it, and the court can sympathize with that feeling. However, as the United States Supreme Court stated in 1913 in the case of *Metropolis Theatre Co.* v. *Chicago* (*supra*, pp. 69-70): "To be able to find fault with a law is not to demonstrate its invalidity. It may seem unjust and oppressive, yet be free from judicial interference. The problems of government are practical ones and may justify, if they do not require, rough accommodations —illogical, it may be, and unscientific • • • [m]ere errors of government are not subject to our judicial review."

The constitutionality of the tax seems well grounded. Accordingly the motion by the defendant, City of New York, for summary judgment is granted and the cross motion denied.

Appendix A

Opinion of New York Court of Appeals

FULD, J. On these direct appeals on constitutional grounds from judgments rendered at Special Term, we are called upon to determine the constitutionality of the New York City Commercial Rent or Occupancy Tax Law.

In the first of the above-entitled actions—*Ampco* v. *City of New York*—the plaintiffs seek a declaratory judgment that chapter 257 of the Laws of 1963, the enabling act for the tax in question, and Local Law No. 38 of the City of New York for 1963, the law imposing the tax, are void and unconstitutional. The plaintiff Ampco is engaged in business on leased premises, the plaintiff Katz operates a public parking business on leased land and the plaintiff Georgian Press owns real property, portions of which it rents to others. In the second of the above-entitled cases, also for a declaratory judgment that the laws in question are unconstitutional, the plaintiff is a tenant on leased premises engaged in the insurance brokerage and bonding agent business. After service of the answers—by the defendant city and intervenor Attorney-General—all parties moved for summary judgment.

The court at Special Term rejected each of the contentions advanced by the plaintiffs, concluding that the tax imposed (1) is not one on real estate in violation of article VIII, section 10, of the New York State Constitution; (2) does not constitute an ad valorem tax on intangible personal property in violation of article XVI, section 3, of that same Constitution; and (3) does not violate the due process or the equal protection clauses of either the State or Federal Constitution (N. Y. Const., art. I, §§ 6, 11; U. S. Const., 14th Amdt.). On this appeal, the plaintiffs and the several *amici curiae*, "friendly" to them, advance the same arguments as were urged below.

The enabling act, chapter 257 of the Laws of 1963, authorizes a city having a population of one million or

more to impose a tax, such as the State Legislature could impose, "on persons occupying premises in such city for the purpose of carrying on or exercising any trade, business, profession, vocation or commercial activity, measured by the rent paid for the use or occupancy of such premises". Pursuant to this statute, the city enacted Local Law No. 38 for the year 1963 which imposes the authorized tax. It provides that every tenant of taxable premises is required, after June 1, 1963, to pay a tax of 2½% of his base rent where such rent is not more than $2,500 a year or 5% of his base rent where it is in excess of that amount (Administrative Code of City of New York, § L46-2.0, subd. a). It defines "taxable premises", insofar as pertinent, as (§ L46-1.0, subd. 5)

> "Any premises in the city occupied, used, or intended to be occupied or used for the *purpose of* carrying on or exercising any trade, business, profession, vocation or commercial activity, including any premises so used even though it is used solely for the purpose of renting, or granting the rights to occupy or use, the same premises in whole or in part to tenants".

Article VIII, section 10, of the State Constitution, upon which the plaintiffs predicate their first point, concededly applies only to a "tax on real estate". This constitutional provision limits the amount to be raised by such a tax to a percentage "of the average full valuation of taxable real estate" of the city and such average full valuation is determined by "taking the assessed valuations of taxable real estate on the last completed assessment rolls and the four preceding rolls * * * and applying thereto the ratio which such assessed valuation * * * bears to the full valuation". If, as the plaintiffs assert, the tax under consideration is one imposed on real estate, adding it to the tax already imposed on assessed valuation would admit-

tedly result in a total tax which would exceed the limit permitted by the Constitution.

The commercial rent or occupancy tax, as already stated, is imposed on a tenant of taxable premises according to his base rent for the tax year, and "tenant" is defined as anyone who pays rent as lessee, sublessee, licensee or concessionaire (Administrative Code, § L46-1.0, subd. 3). This is not a tax on real estate within the sense of the constitutional provision. It is imposed neither on real estate nor on owners of real estate. It is imposed on lessees of real estate or on those who acquire lesser rights to use someone else's real estate for business or other commercial activity.

A leasehold has long been regarded in this State as a "chattel real" and as such is personal property. (See, e.g., *Matter of Fort Hamilton Manor* v. *Boyland*, 4 N Y 2d 192, 197; *Matter of Grumman Aircraft Eng. Corp.* v. *Board of Assessors*, 2 N Y 2d 500, 507; *Despard* v. *Churchill*, 53 N. Y. 192; see, also, 3 Thompson, Real Property [1940], § 1018, pp. 8-10.) "Under a long line of New York decisions," this court recently declared in the *Fort Hamilton Manor* case (4 N Y 2d, at p. 197), "the interest of a tenant of realty under a real estate lease is not realty but is a chattel real which is personal property [cases cited]. The most recent expression of this court upon the point is in *Matter of Grumman Aircraft Eng. Corp.* v. *Board of Assessors* (2 N Y 2d 500, 507), where it was said: 'It is significant to note that nowhere in the Tax Law has the Legislature characterized a leasehold as taxable real property. Such omission is understandable, as a lease for years is deemed personalty [cases cited].'"

We are not persuaded by the plaintiffs' contention that the economic impact of the tax is equivalent to a tax on real estate and that, therefore, it should be treated as coming within the constitutional limitation. After observing that ownership of real property includes the right to use it and

to lease it for use by others, the plaintiffs conclude that a tax on the use of real estate is a tax on the real estate itself. Such reasoning has been repeatedly rejected. (See, e.g., *Bromley* v. *McCaughn*, 280 U. S. 124; *New York ex rel. Cohn* v. *Graves*, 300 U. S. 308, 314-315; *Hale* v. *State Board*, 302 U. S. 95, 107.) Thus, Mr. Justice STONE stated in the *Bromley* case (280 U. S., at p. 136):

> "While taxes levied upon or collected from persons because of their general ownership of property may be taken to be direct, *Pollack* v. *Farmers Loan & Trust Company*, 157 U. S. 429, 158 U. S. 601, this Court has consistently held, almost from the foundation of the government, that a *tax imposed upon a particular use of property or the exercise of a single power over property incidental to ownership, is an excise* which need not be apportioned, and it is enough for present purposes that this tax is of the latter class." (Emphasis supplied.)

Also without merit is the plaintiffs' second point that the tax is an ad valorem tax on intangible personal property and, by reason thereof, violative of article XVI, section 3, of the State Constitution. The second sentence of section 3, upon which the plaintiffs rely, provides, in part, that 'Intangible personal property shall not be taxed ad valorem nor shall any excise tax be levied solely because of the ownership or possession thereof". The tax here involved is not an ad valorem tax but, even if it were, it would be one on a leasehold which, quite clearly, is not "intangible personal property" within the sense of the constitutional provision.

The phrase "ad valorem" means "according to the value" and is used in the field of taxation to designate an assessment of taxes against property at a certain rate upon its value. An ad valorem property tax is always based

upon ownership of property and is payable regardless of whether the property is used or not. (See *Matter of Guardian Life Ins. Co.* v. *Chapman*, 302 N. Y. 226, 238-239; *Powell* v. *Gleason*, 50 Ariz. 542, 547-548; *Walla Walla* v. *State*, 197 Wash. 357, 362; see, also, 51 Am. Jur., Taxation, § 26, p. 53.) The definition itself excludes from its coverage the tax before us. The tax is not based merely upon ownership or possession regardless of whether the property is used or not; there is no provision for the determination or assessment of the value of the property; nor is the tax imposed according to the property's value.

In any event, though, the tax could not be considered a tax on "intangible" personal property. A leasehold has consistently been regarded as tangible. (See, e.g., *People ex rel. American Ice Co.* v. *State Bd. of Tax Comrs.*, 153 App. Div. 532, 539 [majority opinion], 541 [minority opinion], mod. 207 N. Y. 766; *People ex rel. Astor Trust Co.* v. *State Tax Comm.*, 174 App. Div. 320, 323; *Moulton* v. *Commissioner of Corporations*, 243 Mass. 129; *Matter of Barclay*, 1 Wn. 2d 82, 86.) And, if it could possibly be classified as "intangible", not only the wording of the constitutional provision but the record of the Constitutional Convention (of 1938) which proposed that provision makes it evident that property such as a leasehold was never intended to be covered. Applying the rule of *ejusdem generis*, section 3 encompasses only such "other intangible personal property" as resembles "Moneys, credits [and] securities".

Moreover, the Report of the Committee on Taxation which sponsored the provision at the convention discloses that it was designed to assure nonresidents that they could "keep their money and securities [in New York] without any fear that the established legislative policy [of nontaxability] will be changed" (Journal and Documents, N. Y. S. Const. Conv., 1938, Doc. No. 2, p. 3), and Senator Saxe, the chairman of that committee, declared (2 Revised Rec-

ord, N. Y. S. Const. Conv., 1938, pp. 1113-1114): "It is a further assurance to the people of the whole United States that if they send intangibles into the State of New York they are not going to be subjected to ad valorem taxation." The idea that property such as a leasehold would be regarded as an intangible within the meaning of the constitutional provision could not have entered the mind of anyone at the convention.

Nor may the plaintiffs rely on that part of the second sentence of section 3 of article XVI which declares that no excise tax "shall * * * be levied solely because of the ownership or possession" of intangible personal property. As indicated above, the tax does not apply to mere ownership or possession. It applies only when the leased premises are used for commercial purposes (Administrative Code, § L46-1.0, subd. 5). It may, it is true, also apply before the tenant actually makes use of the premises *but* it will apply only where he pays rent for premises "intended to be used or occupied for commercial purposes".[1] A statement made by Senator Saxe at the Constitutional Convention—in response to questions posed by another delegate—serves to illumine the purpose of proposed section 3 of article XVI. After noting that the provision would not bar imposition of a stock transfer tax (2 Revised Record, *op. cit.*, pp. 1114-1115), Mr. Saxe went on to say (p. 1115): "we want to make it impossible for the Legislature itself, or for the Legislature to delegate the right, to levy an excise tax on the mere possession of the property. In other words, the property may enjoy that privilege or *it may be used for some purpose, and then you can levy an excise tax on it if and when it is used.*" (Emphasis supplied.)

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[1] No one of the plaintiffs, we would interpolate, is paying rent for premises which are not being used or occupied by them and no one of the plaintiffs is a licensee or concessionaire or even a grantor of licenses or concessions. Consequently, we need not consider whether the tax would or would not be valid in such instances.

We are brought, then, to the plaintiffs' final point—that the challenged tax law violates the due process and equal protection clauses of both Federal and State Constitutions by discriminating illegally between tenant occupants of real property and owner occupants.

There can be no doubt that the tax with which we are concerned was imposed solely and simply as an exercise of the taxing power; it was not motivated by any purpose other than the raising of revenue. This being so, the due process clause may not here be availed of to condemn the statute. That clause, it has been said, "is applicable to a taxing statute * * * only if the act be so arbitrary as to compel the conclusion that it does not involve an assertion of the taxing power, but constitutes, in substance and effect, the direct assertion of a different and forbidden power, as, for example, the confiscation of property." (*Magnano Co.* v. *Hamilton*, 292 U. S. 40, 44.) So far as the equal protection clause is concerned, it is well to bear in mind that "in taxation there is a broader power of classification than in some other exercises of legislation." (*Citizens' Tel. Co.* v. *Fuller*, 229 U. S. 322, 329.) In *People ex rel. Hatch* v. *Reardon* (184 N. Y. 431, 445, affd. 204 U. S. 152), this court declared: "Arbitrary selection and discrimination characterize the history of legislation, both state and national, with reference to taxation, yet, when all persons and property in the same class are treated alike, it has uniformly been sustained both by the state and Federal courts. * * * a tax upon all houses, leaving barns and business buildings untaxed, or upon all horses or the sale thereof, leaving sheep and cows untaxed, however unwise, would be within the power of the legislature. * * * The power of taxation necessarily involves the right of selection, which is without limitation, provided all persons in the same situation are treated alike and the tax imposed equally upon all property of the class to which it belongs."

Although there are no cases dealing with a situation such as the one before us, there are decisions which point

the validity of a statute which levies a tax on tenants engaged in commercial activities without levying it on owners who engage in such activities on their own premises and who, of course, are subject to, and must pay, a direct tax on their real property. The Supreme Court has upheld tax laws distinguishing, for instance, between wholesalers and retailers of the same article (see *Liggett Co.* v. *Lee*, 288 U. S. 517, 537-538; *Southwestern Oil Co.* v. *Texas*, 217 U. S. 114); between manufacturers selling their own products and merchants selling the same products (see *Armour & Co.* v. *Virginia*, 246 U. S. 1); and between traveling salesmen who sell sewing machines and those salesmen who sell such machines at an established place of business. (See *Singer Sewing Mach. Co.* v. *Brickell*, 233 U. S. 304. See, also, *Allied Stores of Ohio* v. *Bowers*, 358 U. S. 522, 528; *Asbury Hosp.* v. *Cass County*, 326 U. S. 207, 214-215; *Rast* v. *Van Deman & Lewis*, 240 U. S. 342, 357.) In the light of cases such as these, and of the rationale underlying them, the distinction drawn between owners and tenants—or between tenants paying an annual rental of $2,500 or less and those paying more [2]—may not be considered arbitrary or violative of the equal protection clause of the Federal or State Constitution where, as here, a "state of facts reasonably can be conceived that would sustain it." (*Allied Stores of Ohio* v. *Bowers*, 358 U. S. 522, 528, *supra*.)

The judgment appealed from in each case should be affirmed, with costs.

Chief Judge DESMOND and Judges DYE, VAN VOORHIS, BURKE, SCILEPPI and BERGAN concur.

Judgments affirmed.

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[2] See, e.g., *Vaughan* v. *State of New York* (272 N. Y. 102, app. dsmd. for want of substantial Federal question 300 U. S. 638); *Metropolis Theatre Co.* v. *Chicago* (228 U. S. 61); *Magoun* v. *Illinois Trust & Sav. Bank* (170 U. S. 283, 293 *et seq.*).

APPENDIX B

Final Judgment and Order of New York Court of Appeals

COURT OF APPEALS

STATE OF NEW YORK, SS:

PLEAS in the Court of Appeals, held at the Court of Appeals Hall, in the City of Albany, on the 20th day of February in the year of our Lord one thousand nine hundred and sixty four, before the judges of said Court.

WITNESS:
The HON. CHARLES S. DESMOND, Chief Judge presiding,
RAYMOND J. CANNON, Clerk.

Remittitur February 20, 1964

No. 456

AMPCO PRINTING-ADVERTISERS' OFFSET CORP., & ORS.,
Appellants,

vs.

THE CITY OF NEW YORK, & ORS., & c.,
Respondents,

LOUIS J. LEFKOWITZ, as Attorney General of the State of New York,
Intervenor-Respondent.

BE IT REMEMBERED, That on the 23rd day of December, in the year of our Lord one thousand nine hundred and

sixty-three Ampco Printing-Advertisers' Offset Corp., & ors., the appellants in this cause, came here unto the Court of Appeals, by Nordlinger, Riegelman, Benetar & Charney, their attorneys, and filed in the said Court a Notice of Appeal and return thereto from the judgment of the Supreme Court, New York County. And The City of New York, & ors., & c., the respondents, and Louis J. Lefkowitz, as Attorney General of the State of New York, the intervenor-respondent in said cause, afterwards appeared in said Court of Appeals by Leo A. Larkin, and Louis J. Lefkowitz, Attorney General, attorneys, the latter having appeared pro se.

Which said Notice of Appeal and the return thereto, filed as aforesaid, are hereunto annexed.

Whereupon, The said Court of Appeals having heard this cause argued by Mr. Harold Riegelman, of counsel for appellants, and by Mr. Stanley Buchsbaum, of counsel for the respondents, submitted for the intervenor-respondent, briefs filed by amici curiae, and after due deliberation had thereon did order and adjudge that the judgment herein be and the same hereby is affirmed, with costs.

And it is also further ordered, that the records aforesaid, and the proceedings in this Court, be remitted to the Supreme Court of the State of New York, there to be proceeded upon according to law.

Therefore, it is considered that the said judgment be affirmed, with costs, as aforesaid.

And hereupon, as well the Notice of Appeal and return thereto aforesaid as the judgment of the Court of Appeals aforesaid, by it given in the premises, are by the said Court of Appeals remitted into the Supreme Court of the State of New York before the Justices thereof, according to the form of the statute in such case made and provided, to be enforced according to law, and which record now re-

mains in the said Supreme Court, before the Justices thereof, &c.

RAYMOND J. CANNON,
Clerk of the Court of Appeals of
The State of New York.

Court of Appeals, Clerk's Office,
Albany, February 20, 1964.

(SEAL)

I HEREBY CERTIFY, that the preceding record contains a correct transcript of the proceedings in said cause in the Court of Appeals, with the papers originally filed therein, attached thereto.

/s/ RAYMOND J. CANNON,
Clerk.

Appendix B

Final Judgment of New York Supreme Court

SUPREME COURT OF THE STATE OF NEW YORK

COUNTY OF NEW YORK

Index No. 13077/63

AMPCO PRINTING-ADVERTISERS' OFFSET CORP., THE KATZ PARKING SYSTEM, INC. and THE GEORGIAN PRESS, INC.,
Plaintiffs-Appellants,

against

THE CITY OF NEW YORK, ROBERT F. WAGNER, as Mayor of the City of New York, ABRAHAM D. BEAME, as Comptroller of said City, and HILDA G. SCHWARTZ, as Director of Finance of said City,
Defendants-Respondents.

LOUIS J. LEFKOWITZ, as Attorney General of the State of New York,
Intervenor-Respondent.

The plaintiffs-appellants, having directly appealed to the Court of Appeals from the judgment, entered herein in the Office of the Clerk of the County of New York, on the 6th day of December, 1963, which judgment, among other things adjudged and declared that Chapter 257 of the Laws of 1963 and New York City Local Law No. 38 for 1963 are valid and constitutional, and are not violative of the United States Constitution Amendment 14, Section 1, or of the New York Constitution Article 1, Sections 6 and 11, Article

8, Section 10, or Article 16, Section 3, and that the provisions of the budget of The City of New York for the fiscal year 1963-64 in so far as they pertain, apply or relate to the tax to be imposed under said Local Law are legal and valid, and orders and adjudges that the complaint so far as it seeks to restrain and enjoin the defendants from imposing and levying any tax pursuant to New York City Local Law No. 38 for 1963, be dismissed; and the appeal having been duly argued in the Court of Appeals and that Court in an order dated the 20th day of February, 1964, having ordered and adjudged that the judgment so appealed from be affirmed with costs; (and a copy of the order of said Court having been remitted to and entered in the Office of the Clerk of the Supreme Court, New York County, on the 11th day of March, 1964).

Now, on motion of Leo A. Larkin, Corporation Counsel, attorney for defendants-respondents, and Louis J. Lefkowitz, as Attorney General of the State of New York, intervenor-respondent, pro se, it is

ADJUDGED that the judgment so appealed from be and the same hereby is affirmed, and it is further

ADJUDGED that defendants-respondents, The City of New York, Robert F. Wagner, as Mayor of the City of New York, Abraham D. Beame, as Comptroller of said City, and Hilda G. Schwartz, as Director of Finance of said City (Municipal Building, New York 7, New York) recover of the plaintiffs-appellants, Ampco Printing-Advertisers' Offset Corp. (155 Sixth Avenue, New York, New York), The Katz Parking System, Inc. (70 Worth Street, New York, New York), and The Georgian Press, Inc. (175 Varick Street, New York, New York) the sum of $272.32, costs as taxed, and that said defendants have execution therefor, and it is further

Appendix B

ADJUDGED that the intervenor-respondent, Louis J. Lefkowitz, as Attorney General of the State of New York (270 Broadway, New York, New York) recover of the plaintiffs-appellants, Ampco Printing-Advertisers' Offset Corp. (155 Sixth Avenue, New York, New York), The Katz Parking System, Inc. (70 Worth Street, New York, New York, and the Georgian Press, Inc. (175 Varick Street, New York, New York), the sum of $65, costs as taxed, and that said intervenor-respondent have execution therefor.

Dated: March 26, 1964.

JAMES McGUIRIN,
Clerk.

APPENDIX C

Local Law 38, of the City of New York, of 1963

COMMERCIAL RENT OR OCCUPANCY TAX

TITLE L

Commercial Rent or Occupancy Tax

(As Enacted by L. L. 38, Laws of 1963.)

(Effective June 1, 1963)

Sec. L46-1.0 Definitions.—When used in this title the following terms shall mean or include:

1. "Person." An individual, partnership, society, association, joint stock company, corporation, estate, receiver, assignee, trustee or any other person acting in a fiduciary capacity, whether appointed by a court or otherwise, and any combination of individuals.

2. "Landlord." A person who grants the right to use or occupy premises to any lessee, sublessee, licensee or concessionaire, whether or not he is the owner of the premises.

3. "Tenant." A person paying or required to pay rent for premises as a lessee, sublessee, licensee or concessionaire.

4. "Premises." Any real property or part thereof, and any structure thereon or space therein.

5. "Taxable premises." Any premises in the city occupied, used or intended to be occupied or used for the purpose of carrying on or exercising any trade, business, profession, vocation or commercial activity, including any

premises so used even though it is used solely for the purpose of renting, or granting the right to occupy or use, the same premises in whole or in part to tenants; except premises within the area leased by the city of New York to the New York World's Fair 1964-1965 Corporation pursuant to chapter four hundred twenty-eight of the laws of nineteen hundred sixty, as amended, during the period of such lease.

6. "Rent." The consideration paid or required to be paid by a tenant for the use or occupancy of premises, valued in money, whether received in money or otherwise, including all credits and property or services of any kind and including any payment required to be made by him on behalf of his landlord for real estate taxes, water rents or charges, sewer rents or any other expenses (including insurance) normally payable by a landlord who owns the realty other than expenses for the improvement, repair or maintenance of the tenant's premises.

7. "Base rent." The rent paid for each taxable premises by a tenant to his landlord for a period, less the amounts received by or due such tenant for the same period from any tenant of any part of such premises:

(i) as rent for premises which constitute taxable premises of such tenant except where such tenant is exempt from tax thereon pursuant to subdivision b or paragraph six of subdivision c of section L46-4.0 of this title;

(ii) as rent for premises which do not constitute taxable premises and which are used by such tenant as lodging or residential premises (including such residential premises in hotels, apartment hotels or lodging houses as defined in title V of chapter forty-six of this code);

(iii) who is exempt from tax under subdivision a of section L46-4.0 of this title.

(iv) as rent for premises which do not constitute taxable premises where such rent is, or to the extent that such rent is, deductible from the base rent of such tenant by reason of paragraph five of subdivision c of section L46-4.0 of this title.

(v) as rent for premises which do not constitute taxable premises, pursuant to a common law relationship of landlord and tenant (notwithstanding the definition given to those terms by paragraphs two and three of this section) except where it is received as rent, whether or not such landlord-tenant relationship exists, for premises which are occupied as or constitute:

(a) a locker, safe deposit box or beach cabana;

(b) storage space in part of a warehouse or in part of any other structure or area in which goods are stored;

(c) garage space or parking space in any part of a garage, of a parking lot or of a parking area where the entire garage, entire parking lot or entire parking area accommodates more than two motor vehicles;

(d) an occupancy of a type which customarily has not been the subject of such a common law relationship of landlord and tenant.

Nothing contained in this title shall be construed to permit a tenant to deduct the same rent from his base rent more than once.

8. "Premises used for railroad transportation purposes." The portion of any premises of any person actually operating a railroad, used by such person for normal or necessary railroad transportation purposes. The words normal or necessary railroad transportation purposes, as used in this definition, shall not include any activities which are normally carried on by persons not engaged in rail-

nishing railroad transportation service such as the operation of retail stores, barber shops, restaurants, theatres, hotels, and newsstands; nor shall such words include any activities which are not deemed transportation purposes under sections four hundred eighty-nine-b and four hundred eighty-nine-m of the New York real property tax law.

9. "Premises used for air transportation purposes." The portion of any premises, located within an airport or within an air transportation terminal shared by more than one air line, of any person actually operating an air line as a common carrier, used by such person for normal or necessary air transportation purposes. The words normal or necessary air transportation purposes, as used in this definition, shall not include any activities which are normally carried on by persons not engaged in furnishing air transportation service such as the operation of retail stores, barber shops, restaurants, theatres, hotels and newsstands.

10. "Return." Any return filed or required to be filed as herein provided other than an information return.

11. "Tax period." The period for which any return is required to be filed under this title.

12. "Tax year." June first of any calendar year through May thirty-first of the following calendar year.

13. "Day." A calendar day or any part thereof.

14. "City." The city of New York.

15. "Director of finance." The director of finance of the city.

16. "Comptroller." The comptroller of the city.

17. "Dramatic or musical arts performance." A performance or repetition thereof in a theatre, opera house or concert hall of a live dramatic performance, whether or not musical in part. The performance encompassed by this definition shall include so-called legitimate theatre plays, musical comedies and operettas. They shall not include circuses, ice skating shows or aqua-shows; they shall not include performances of any kind in a roof garden, cabaret or other similar place; and they shall not include radio or television performances, whether or not such performances are prerecorded for later broadcast.

18. "Premises used for omnibus transportation purposes." The portion of any premises located within a passenger terminal of any person actually operating an omnibus line or routes as a common carrier, used by such person for normal or necessary omnibus line or route transportation purposes. The words normal or necessary omnibus line or route transportation purposes, as used in this definition, shall not include any activities which are normally carried on by persons not engaged in furnishing omnibus line or route transportation services such as the operation of retail stores, barber shops, restaurants, theatres, hotels and newsstands.

Sec. L46-2.0 Imposition of Tax.—a. For each tax year commencing on or after June first, nineteen hundred sixty-three, every tenant shall pay a tax of two and one-half per centum of his base rent for such tax year where his base rent is not in excess of twenty-five hundred dollars per year or where his base rent is for a period of less than one year and would not exceed twenty-five hundred dollars for a year if it were paid on an equivalent basis for an entire year or a tax of five per centum of his base rent for such tax year where his base rent is in excess of twenty-five hundred dollars per year or where his base

rent is for a period of less than one year and would exceed twenty-five hundred dollars a year if it were paid on an equivalent basis for an entire year.

b. Nothing contained in this title shall be deemed to require payment of a double or multiple tax pursuant to this title on any part of any taxable premises.

c. Where a tenant pays an undivided rent for premises used both for residential purposes and as taxable premises, the tax shall be applicable to so much of the rent as is ascribable to the portion of such premises used as taxable premises. Where, however, the rent ascribable to so much of such premises as is used as taxable premises does not exceed fifty dollars a month, such rent shall be excluded from such tenant's base rent. Nothing contained in this subdivision shall be construed as indicating an intent to exclude any base rent from the tax imposed by this title merely because it is paid as part of an undivided rent for premises which are only partially used as taxable premises.

d. The tax imposed by this title shall be in addition to any and all other taxes including the public housing tax imposed by title E of chapter forty-six of this code.

e. Nothing contained in this section shall be construed as permitting base rent of a tenant for one taxable premises to be reduced by deducting rents received by him for another taxable premises of which he is also a tenant.

SEC. L46-3.0 PRESUMPTIONS AND BURDEN OF PROOF.—a. For the purpose of the proper administration of this title and to prevent evasion of the tax hereby imposed it shall be presumed that all premises are taxable premises and that all rent paid or required to be paid by a tenant is base rent until the contrary is established, and the burden of proving that such presumptive base rent or any portion thereof is

not included in the measure of the tax imposed by this title shall be on the tenant.

b. Where a tenant uses premises both for residential purposes and as taxable premises and the tenant pays an undivided rent for the premises so used, it shall be conclusively presumed against such tenant that the rent ascribable to so much of such premises as is used as taxable premises shall be the amount which such tenant deducts as rent for such premises in determining his federal income tax (as reduced by any disallowance of such deduction which is not being contested) which is fairly attributable to the tax period or tax year.

SEC. L46-4.0 EXEMPTIONS AND DEDUCTIONS FROM BASE RENT.—a. The following shall be exempt from the payment of the tax imposed by this title:

1. The state of New York, or any public corporation (including a public corporation created pursuant to agreement or compact with another state or the Dominion of Canada), improvement district or other political subdivision of the state;

2. The United States of America, insofar as it is immune from taxation;

3. The United Nations or other world-wide international organizations of which the United States of America is a member; and

4. Any corporation, or association, or trust, or community chest, fund or foundation, organized and operated exclusively for religious, charitable, or educational purposes, or for the prevention of cruelty to children or animals, and no part of the net earnings of which inures to the benefit of any private shareholder or individual and no

substantial part of the activities of which is carrying on propaganda, or otherwise attempting to influence legislation; provided, however, that nothing in this paragraph shall include an organization operated for the primary purpose of carrying on a trade or business for profit, whether or not all of its profits are payable to one or more organizations described in this paragraph.

5. Any tenant who would be subject to taxes under this title aggregating no more than one dollar for a tax year with respect to all taxable premises used by him.

b. A tenant who uses premises for no more than fourteen days in a tax year whether or not consecutive, where his agreement with his landlord does not require him to pay rent for a longer period shall be exempt from the payment of the tax imposed by this article in respect to the rent paid by him for such premises.

c. Base rent shall be reduced by the amount of the taxpayer's rent for, or reasonably ascribable to, the taxpayer's own use of the premises:

1. As premises used for railroad transportation purposes.

2. As premises used for air transportation purposes.

3. As piers insofar as such premises are used in interstate or foreign commerce.

4. Which are located in, upon, above or under any public street, highway or other public place, and which are defined as special franchise property in the New York real property tax law.

5. Which are taxed pursuant to title V of chapter forty-six of this code to the extent that such premises are subject to, and during the period that they are subject to, such tax.

6. Which are taxed pursuant to subdivisions b or c of section E46-5.0 of title E of chapter forty-six of this code.

7. Which are advertising signs, advertising space, vending machines or newsstands within or attached to stations, platforms, stairways, entranceways, passageways, mezzanines or tracks of a rapid transit subway or elevated railroad operated by the New York City Transit Authority when the rent of the tenant or of his landlord is payable to such Authority.

8. As premises used for omnibus transportation purposes.

d. A tenant who uses taxable premises for renting to others for residential purposes to the extent of seventy-five per centum or more of the rentable floor space shall be exempt from the tax imposed by this article in respect to the rent paid for such premises from the time that construction thereof commences; provided, however, that this paragraph shall not be applicable to hotels, apartment hotels or lodging houses as defined in title V of chapter forty-six of this code.

e. A tenant who uses taxable premises for a dramatic or musical arts performance for less than four weeks where there is no indication prior to or at the time that such performance commences that the performance is intended to continue for less than four weeks.

SEC. L46-5.0 RETURNS.—a. Every tenant subject to tax under this title shall file with the director of finance a return with respect to the taxes payable for the three month periods ending on the last days of August, November and February of each year and a final return with respect to the taxes payable for the tax year ending on the last day of May of each year except May of nineteen hundred sixty-

three. Such returns shall be filed within twenty days from the expiration of the period covered thereby. The director of finance may permit or require returns (including final returns) to be made by other periods and upon such dates as he may specify and, if he deems it necessary in order to insure the payment of the tax imposed by this title, he may require such returns to be made for shorter periods than those prescribed by the foregoing provisions of this section, and upon such dates as he may specify.

b. The director of finance may by regulation require the filing of information returns and supplemental information returns by landlords and by tenants of taxable premises, whether or not they are required to pay the tax imposed by this title, upon such dates or at such times as he may specify if he deems the filing of such information returns necessary for proper administration of this title.

c. The form of returns and information returns shall be prescribed by the director of finance and shall contain such information as he may deem necessary for the proper administration of this title. The director of finance may require amended returns or amended information returns to be filed within twenty days after notice and to contain the information specified in the notice.

d. If a return or information return is not filed, or if a return of any kind when filed is incorrect or insufficient on its face, the director of finance shall take the necessary steps to enforce the filing of such a return or of a corrected return.

SEC. 146-6.0 PAYMENT OF TAX.—a. The tax imposed by this title shall be due and payable on or before the twentieth day of the calendar month following the end of each tax period and shall be paid to the director of finance, as follows: The tax to be paid at such time shall be based on the base rent for such tax period and the rate of tax shall

be the one which would be applicable if the base rent for such period were the same for each tax period during the tax year, except that the payment required to be made together with the final return or at the time that the final return should be filed shall be the amount by which the actual tax for the tax year exceeds the amounts previously paid for the tax year.

b. Where the final return shows that the amount of tax paid for the tax year exceeds the actual tax for such year, the director of finance shall make the appropriate refund as promptly as possible, provided, however, that where the director of finance has reason to believe that the final return is inaccurate, he may withhold the refund in whole or in part. The making of a refund pursuant to this subdivision shall not prevent the director of finance from making a determination that additional tax is due or from pursuing any other method to recover the full amount of the actual tax due for the tax year.

c. Where a tenant ceases to do business the tax, as measured by his base rent for the prior part of the tax year, shall be due immediately, and he shall file a final return, but, should he continue to pay rent for the taxable premises, he shall file the normally required returns and a final return for the tax year, provided, however, that any such tax payment shall be applied in reduction of the tax payments required to be made with such returns or with the final return for such tax year.

SEC. L46-7.0 RECORDS TO BE KEPT.—Every landlord of taxable premises and every tenant of taxable premises shall keep records of rent paid and received by him in such form as the director of finance may by regulation require, all leases or agreements which fix the rents or rights of tenants of taxable premises, and such other records, receipts and other papers relevant to the ascertainment of

the tax due under this title as the director of finance may by regulation require. Such records shall be offered for inspection and examination at any time upon demand by the director of finance. Such records, unless the director of finance consents to a sooner destruction or requires that they be kept for a longer time, shall be preserved for a period of three years except that leases or agreements which fix the rents or rights of a tenant shall be kept for a period of three years after the expiration of the tenancy thereunder.

SEC. L46-8.0 DETERMINATION OF TAX.—If a return required by this title is not filed, or if a return when filed is incorrect or insufficient, the director of finance shall determine the amount of tax due from such information as may be obtainable and, if necessary, may estimate the tax on the basis of external indices. Notice of such determination shall be given to the person liable for the payment of the tax. Such determination shall finally and irrevocably fix the tax unless the person against whom it is assessed, within thirty days after the giving of notice of such determination shall apply in writing to the director of finance for a hearing or unless the director of finance of his own motion shall redetermine the same. After such hearing the director of finance shall give notice of his determination to the person against whom the tax is assessed. The determination of the director of finance shall be reviewable for error, illegality or unconstitutionality or any other reason whatsoever by a proceeding under article seventy-eight of the civil practice act if application therefor is made to the supreme court within thirty days after the giving of the notice of such final determination, provided, however, that any such proceeding under article seventy-eight of the civil practice act shall not be instituted unless (a) the amount of any tax sought to be reviewed, with interest and penalties thereon, if any, shall be first deposited and there is

filed an undertaking with the director of finance, issued by a surety company authorized to transact business in this state and approved by the superintendent of insurance of this state as to solvency and responsibility, in such amount as a justice of the supreme court shall approve to the effect that if such proceeding be dismissed or the tax confirmed the petitioner will pay all costs and charges which may accrue in the prosecution of such proceeding or (b) at the option of the petitioner such undertaking may be in a sum sufficient to cover the taxes, interest and penalties stated in such determination plus the costs and charges which may accrue against it in the prosecution of the proceeding, in which event the petitioner shall not be required to pay such taxes, interest or penalties as a condition precedent to the application.

SEC. L46-9.0 REFUNDS.—a. In the manner provided in this section the director of finance shall refund or credit, without interest, any tax, penalty or interest erroneously, illegally or unconstitutionally collected or paid, if written application to the director of finance for such refund shall be made within eighteen months from the date fixed by this title for filing the return on which such payment was based or within six months of the payment thereof, whichever of such periods expire the later. Whenever a refund or credit is made, the director of finance shall state his reason therefor in writing. The director of finance may, in lieu of any refund required to be made, allow credit therefor on payments due from the applicant.

b. An application for a refund or credit made as herein provided shall be deemed an application for a revision of any tax, penalty or interest complained of and the director of finance may receive evidence with respect thereto. After making his determination the director of finance shall give notice thereof to the applicant who shall be

entitled to institute a proceeding pursuant to article seventy-eight of the civil practice act to review such determination if application to the supreme court be made therefor within ninety days after the giving of notice of such determination, and provided that a final determination of tax due was not previously made. Such a proceeding shall not be instituted unless an undertaking shall first be filed with the director of finance, in such amount and with such sureties as a justice of the supreme court shall approve, to the effect that if such proceeding be dismissed or the tax confirmed, the petitioner will pay all costs and charges which may accrue in the prosecution of the proceeding.

c. A person shall not be entitled to a revision, refund or credit under this section of a tax, interest or penalty which had been determined to be due pursuant to the provisions of section L46-8.0 of this title where he has had a hearing or an opportunity for a hearing, as provided in said section, or has failed to avail himself of the remedies therein provided. No refund or credit shall be made of a tax, interest or penalty paid after a determination by the director of finance made pursuant to section L46-8.0 of this title unless it be found that such determination was erroneous, illegal or unconstitutional, or otherwise improper, by the director of finance after a hearing, or in a proceeding under article seventy-eight of the civil practice act, pursuant to the provisions of said section, in which event refund or credit without interest shall be made of the tax, interest or penalty found to have been overpaid.

SEC. L46-10.0 REMEDIES EXCLUSIVE.—The remedies provided by this title shall be the exclusive remedies available to any person for the review of tax liability imposed by this title; and no determination or proposed determination of tax or determination on any application for refund shall be enjoined or reviewed by an action for declaratory

judgment, an action for money had and received or by any action or proceeding other than a proceeding under article seventy-eight of the civil practice act; provided, however, that a taxpayer may proceed by declaratory judgment if he institutes suit within thirty days after a deficiency assessment is made and pays the amount of the deficiency assessment to the director of finance prior to the institution of such suit and posts a bond for costs as provided in section L46-8.0 of this title.

SEC. L46-11.0 RESERVES.—In cases where the taxpayer has applied for a refund and has instituted a proceeding under article seventy-eight of the civil practice act to review a determination adverse to him on his application for refund, the comptroller shall set up appropriate reserves to meet any decision adverse to the city.

SEC. L46-12.0 PROCEEDINGS TO RECOVER TAX.—a. Whenever any person shall fail to pay any tax or penalty or interest imposed by this title as herein provided, the corporation counsel shall, upon the request of the director of finance, bring or cause to be brought an action to enforce payment of the same against the person liable for the same on behalf of the city of New York in any court of the state of New York or of any other state or of the United States. If, however, the director of finance in his discretion believes that a taxpayer subject to the provisions of this title is about to cease business, leave the state or remove or dissipate the assets out of which tax or penalties might be satisfied and that any such tax or penalty will not be paid when due, he may declare such tax or penalty to be immediately due and payable and may issue a warrant immediately.

b. As an additional or alternate remedy, the director of finance may issue a warrant, directed to the city sheriff commanding him to levy upon and sell the real and per-

sonal property of such person which may be found within the city, for the payment of the amount thereof, with any penalties and interest, and the cost of executing the warrant, and to return such warrant to the director of finance and to pay to him the money collected by virtue thereof within sixty days after the receipt of such warrant. The city sheriff shall, within five days after the receipt of the warrant, file with the county clerk a copy thereof, and thereupon such clerk shall enter in the judgment docket the name of the person mentioned in the warrant and the amount of the tax, penalties and interest for which the warrant is issued and the date when such copy is filed. Thereupon the amount of such warrant so docketed shall become a lien upon the title to and interest in real and personal property of the person against whom the warrant is issued. The city sheriff shall then proceed upon the warrant in the same manner and with like effect as that provided by law in respect to executions issued against property upon judgments of a court of record, and for services in executing the warrant he shall be entitled to the same fees which he may collect in the same manner. In the discretion of the director of finance a warrant of like terms, force and effect may be issued and directed to any officer or employee of the department of finance, and in the execution thereof such officer or employe shall have all the powers conferred by law upon sheriffs, but he shall be entitled to no fee or compensation in excess of the actual expenses paid in the performance of such duty. If a warrant is returned not satisfied in full, the director of finance may from time to time issue new warrants and shall also have the same remedies to enforce the amount due thereunder as if the city had recovered judgment therefor and execution thereon had been returned unsatisfied.

c. Whenever there is made a sale, transfer or assignment in bulk of any part or the whole of a stock of mer-

chandise or of fixtures, or merchandise and of fixtures pertaining to the conducting of the business of the seller, transferrer or assignor, otherwise than in the ordinary course of trade and in the regular prosecution of said business, the purchaser, transferee or assignee shall at least ten days before taking possession of such merchandise, fixtures, or merchandise and fixtures, or paying therefor, notify the director of finance by registered mail of the proposed sale and of the price, terms and conditions thereof of whether or not the seller, transferrer or assignor, has represented to, or informed the purchaser, transferee or assignee that it owes any tax pursuant to this title and whether or not the purchaser, transferee or assignee has knowledge that such taxes are owing, and whether any such taxes are in fact owing.

Whenever the purchaser, transferee or assignee shall fail to give notice to the director of finance as required by the preceding paragraph, or whenever the director of finance shall inform the purchaser, transferee or assignee that a possible claim for such tax or taxes exists, any sums of money, property or choses in action, or other consideration, which the purchaser, transferee or assignee is required to transfer over to the seller, transferrer or assignor shall be subject to a first priority right and lien for any such taxes theretofore or thereafter determined to be due from the seller, transferrer or assignor to the city, and the purchaser, transferee or assignee is forbidden to transfer to the seller, transferrer or assignor any such sums of money, property or choses in action to the extent of the amount of the city's claim. For failure to comply with the provisions of this subdivision, the purchaser, transferee or assignee, in addition to being subject to the liabilities and remedies imposed under the provisions of section forty-four of the personal property law, shall be personally liable for the payment to the city of any such taxes theretofore or thereafter determined to be due to the city from the

seller, transferrer or assigner, and such liability may be assessed and enforced in the same manner as the liability for tax under this title.

SEC. L46-13.0 GENERAL POWERS OF THE DIRECTOR OF FINANCE.—In addition to the powers granted to the director of finance in this title, he is hereby authorized and empowered:

1. To make, adopt and amend rules and regulations appropriate to the carrying out of this title and the purposes thereof;

2. To extend for cause shown, the time for filing any return for a period not exceeding ninety days; and for cause shown, to remit penalties but not interest computed at the rate of six per centum per annum; and to compromise disputed claims in connection with the taxes hereby imposed;

3. To request information from the tax commission of the state of New York or the treasury department of the United States relative to any person; and to afford information to such tax commission or such treasury department relative to any person;

4. To delegate his functions hereunder to a deputy director of finance or other employee or employees of his department;

5. To assess, determine, revise and adjust the taxes imposed under this title.

6. To require any tenant who uses premises for both residential purposes and as taxable premises and who pays an undivided rent for the entire premises so used to pro-

vide him with a signed and notarized request to the United States director of internal revenue for photostatic copies of the tenant's income tax return for any year when he deems such income tax return necessary to determine the rent ascribable to so much of such premises as is used as taxable premises; and, if the tenant refuses to provide him with such a signed written request, to treat the rent for the entire premises as the rent for so much as is used as taxable premises.

7. To prescribe methods for determining how much of any tenant's base rent is ascribable to a use which results in a reduction of the base rent or for determining any other division of rent or of use of premises necessary for the determination of the base rent or the amount of base rent subject to tax under this title.

SEC. L46-14.0 ADMINISTRATION OF OATHS AND COMPELLING TESTIMONY.—a. The director of finance or his employees duly designated and authorized by him shall have power to administer oaths and take affidavits in relation to any matter or proceeding in the exercise of his powers and duties under this title. The director of finance shall have power to subpoena and require the attendance of witnesses and the production of books, papers and documents to secure information pertinent to the performance of his duties hereunder and of the enforcement of this title and to examine them in relation thereto, and to issue commissions for the examination of witnesses who are out of the state or unable to attend before him or excused from attendance.

b. A justice of the supreme court either in court or at chambers shall have power summarily to enforce by proper proceedings the attendance and testimony of witnesses and the production and examination of books, papers and

documents called for by the subpoena of the director of finance under this title.

c. Any person who shall refuse to testify or to produce books or records or who shall testify falsely in any material matter pending before the director of finance hereunder shall be guilty of a misdemeanor, punishment for which shall be a fine of not more than one thousand dollars or imprisonment for not more than one year, or both such fine and imprisonment.

d. The officers who serve the summons or subpoena of the director of finance hereunder and witnesses attending in response thereto shall be entitled to the same fees as are allowed to officers and witnesses in civil cases in courts of record, except as herein otherwise provided. Such officers shall be the city sheriff, and his duly appointed deputies or any officers or employees of the department of finance, designated to serve such process.

SEC. 146-15.0 PENALTIES AND INTEREST.—a. Any person failing to file a return, other than a final return, or to pay any tax required by this title to be paid at the time such return is filed to the director of finance for a tax period other than one for which a final return is required shall be subject to interest at the rate of one per centum of such tax for each month of delay until twenty days after the end of the tax year during which such payments were due or until such prior time that the tax paid for the tax year equals seventy-five percentum of the full tax required to be paid for the tax year. Such interest shall be paid with the final return for the tax year to which it relates.

b. Any person failing to file a final return or to pay any tax required to be paid together with the final return to the director of finance within the time required by this title shall be subject to a penalty of five per centum of the amount of tax due with the final return, plus interest at

the rate of one per centum of such tax for each month of delay excepting the first month, after such final return was required to be filed or such tax became due.

c. The director of finance, if satisfied that the delay under subdivision a or b of this section was excusable, may remit all or any part of such interest or penalty, but not interest at the rate of six per centum per year. Such penalties and interest shall be paid and disposed of in the same manner as other revenues from this title. Unpaid penalties and interest may be enforced in the same manner as the tax imposed by this title.

d. Any person and any officer of a corporation making or causing to be made, or giving or causing to be given, any return, final return, information return, certificate, affidavit, statement, representation, information, or testimony required or authorized by this title which is wilfully false and any person, any officer of a corporation and any partner who shall fail to file a return, final or information return required under this title or failing to retain the records required to be retained by section L46-7.0 of this title, shall be guilty of a misdemeanor, punishment for which shall be a fine of not more than one thousand dollars or imprisonment for not more than one year, or both such fine and imprisonment. The certificate of the director of finance to the effect that a tax has not been paid, that a return has not been filed, or that information has not been supplied pursuant to the provisions of this title shall be prima facie evidence thereof.

Sec. L46-16.0 Returns to be Secret.—Except in accordance with proper judicial order or as otherwise provided by law, it shall be unlawful for the director of finance or any officer or employee of the department of finance to divulge or make known in any manner any information

relating to the business of a taxpayer contained in any return required under this title. The officers charged with the custody of such returns shall not be required to produce any of them or evidence of anything contained in them in any action or proceeding in any court, except on behalf of the director of finance in an action or proceeding under the provisions of this title, or on behalf of any party to any action or proceeding under the provisions of this title when the returns or facts shown thereby are directly involved in such action or proceeding, in either of which events the courts may require the production of, and may admit in evidence so much of said returns or of the facts shown thereby, as are pertinent to the action or proceeding and no more. Nothing herein shall be construed to prohibit the delivery to a taxpayer or his duly authorized representative of a certified copy of any return filed in connection with his tax; nor to prohibit the delivery of such a certified copy of such return or of any information contained in or relating thereto to the United States of America or any department thereof, the state of New York or any department thereof, any agency or any department of the city of New York provided the same is requested for official business; nor to prohibit the inspection for official business of such returns by the corporation counsel or other legal representatives of the city or by the district attorney of any county within the city; nor to prohibit the publication of statistics so classified as to prevent the identification of particular returns or items hereof.

SEC. L46-17.0 NOTICES AND LIMITATION OF TIME.—a. Any notice authorized or required under this [the] provisions of this title may be given to the person for whom it is intended by mailing it in a postpaid envelope addressed to such person at the address given in the last return filed by him pursuant to the provisions of this title or in any

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application made by him or if no return has been filed or application made, then to such address as may be obtainable. The mailing of a notice as in this subsection provided for shall be presumptive evidence of the receipt of the same by the person to whom addressed. Any period of time which is determined according to the provisions of this title by the giving of notice shall commence to run from the date of mailing of such notice as in this subdivision provided.

b. The provisions of the civil practice act or any other law relative to limitations of time for the enforcement of a civil remedy shall not apply to any proceeding or action taken by the city to levy, appraise, assess, determine or enforce the collection of any tax or penalty provided by this title. However, except in the case of a wilfully false or fraudulent return with intent to evade the tax, no assessment of additional tax shall be made after the expiration of more than three years from the date of the final return for the tax year to which the assessment relates; provided, however, that where no return has been made as provided by law, the tax may be assessed at any time.

c. Where before the expiration of the period prescribed herein for the assessment of an additional tax, a person has consented in writing that such period be extended, the amount of such additional tax due may be determined at any time within such extended period. The period so extended may be further extended by subsequent consents in writing made before the expiration of the extended period.

SEC. L46-18.0 CONSTRUCTION AND ENFORCEMENT.—This title shall be construed in conformity with chapter two hundred fifty-seven of the laws of nineteen hundred sixty-three, pursuant to which it is enacted. Any reference in this title to article seventy-eight of the civil practice act

shall be construed to mean article seventy-eight of the civil practice law and rules on the date that the civil practice act is repealed.

SEC. L46-19.0 SEPARABILITY.—If any provision of this title, or the application thereof to any person or circumstances, is held invalid, the remainder of this title, and the application of such provisions to other persons or circumstances shall not be affected thereby. If any presumption provided for in this title shall be held to be invalid because it has been made conclusive, it shall be treated as a rebuttable presumption. It is also intended that, if any exemption or exclusion from base rent provided in section L46-4.0 or in subdivision c of section L46-2.0 is held to be invalid or unconstitutional, or would render any other portion of this title invalid or unconstitutional, for any reason whatsoever, there shall be no such exemption or exclusion from base rent.

Enabling Act, Chapter 257, of the Laws of 1963, of the State of New York

The People of the State of New York, represented in Senate and Assembly, do enact as follows:

Section 1. (1) Notwithstanding any other provision of law to the contrary, any city having a population of one million or more is hereby authorized and empowered to adopt and amend local laws imposing in any such city a tax such as the legislature has or would have the power and authority to impose on persons occupying premises in such city for the purpose of carrying on or exercising any trade, business, profession, vocation or commercial activity, measured by the rent paid for the use or occupancy of such premises, but not to exceed two and one-half percentum of such rent where the rent is not in excess of twenty-five hundred dollars per year or where the rent is

for a period of less than one year and would not exceed twenty-five hundred dollars for the year if it were paid on an equivalent basis for the entire year and not to exceed five percentum of such rent where the rent is in excess of twenty-five hundred dollars per year or where the rent is for a period of less than one year and would exceed twenty-five hundred dollars for the year if it were paid on an equivalent basis for the entire year.

(2) Such tax may be collected and administered by the director of finance or other fiscal officers of such city by such means and in such manner as other taxes which are now collected and administered by such officers in accordance with the charter or administrative code of any such city or as otherwise may be provided by such local law.

(3) When used in this act the following terms and expressions shall mean and include:

a. "Person." An individual, partnership, society, association, joint stock company, corporation, estate, receiver, trustee, assignee, or any other person acting in a fiduciary capacity, whether appointed by a court or otherwise, and any combination of individuals.

b. "Premises." Any real property or part thereof, and any structure thereon or space therein.

c. "Rent." The amount, whether received in money or otherwise, paid by any lessee, sublessee, licensee or concessionaire for the right or permission to occupy the premises, including the amount so paid even though based on a share of profits.

(4) Such local laws may provide that any tax imposed shall be paid by the person liable therefor to the owner of

the premises occupied or to the person entitled to be paid the rent for the premises occupied for and on account of the city imposing the tax and that such owner or person entitled to be paid the rent shall be liable for the collection and payment of the tax; and that such owner or person entitled to be paid the rent shall have the same right in respect to collecting the tax from the person occupying the premises, or in respect to non-payment of the tax by the person occupying the premises, as if the tax were a part of the rent and payable at the same time as the rent; provided, however, that the director of finance or other fiscal officers of such city specified in such local law shall be joined as a party in any action or proceeding brought to collect the tax by the owner or by the person entitled to be paid the rent.

(5) Such local laws may provide that the lower rate or rates of tax provided therein for rents not in excess of twenty-five hundred dollars shall be applicable to rents in excess of that amount and may provide for different rates of tax, not in excess of those specified in subdivision one hereof, for rents in excess of twenty-five hundred dollars or for rents not in excess of that amount and may provide for exclusions or exemptions from such tax other than those specified in this act.

(6) Such local laws may provide for the filing of returns and the payment of the tax on a monthly basis or on the basis of any longer or shorter period of time.

(7) This act shall not authorize the imposition of such tax upon the following:

a. The state of New York, or any public corporation (including a public corporation created pursuant to agreement or compact with another state or the Dom. ion of

Canada), improvement district or other political subdivision of the state;

b. The United States of America, insofar as it is immune from taxation;

c. The United Nations or other world-wide international organizations of which the United States of America is a member; and

d. Any corporation, or association, or trust, or community chest, fund or foundation, organized and operated exclusively for religious, charitable, or educational purposes, or for the prevention of cruelty to children or animals, and no part of the net earnings of which inures to the benefit of any private shareholder or individual and no substantial part of the activities of which is carrying on propaganda, or otherwise attempting to influence legislation; provided, however, that nothing in this paragraph shall include an organization operated for the primary purpose of carrying on a trade or business for profit, whether or not all of its profits are payable to one or more organizations described in this paragraph.

(8) Any final determination of the amount of any tax payable hereunder shall be reviewable for error, illegality or unconstitutionality or any other reason whatsoever by a proceeding under article seventy-eight of the civil practice act if application therefor is made to the supreme court within thirty days after the giving of the notice of such final determination, provided, however, that any such proceeding under article seventy-eight of the civil practice act shall not be instituted unless (a) the amount of any tax sought to be reviewed, with such interest and penalties thereon as may be provided for by local law or regulation, shall be first deposited and there is filed an undertaking, issued by a surety company authorized to transact business in this

state and approved by the superintendent of insurance of this state as to solvency and responsibility, in such amount as a justice of the supreme court shall approve to the effect that if such proceeding be dismissed or the tax confirmed the petitioner will pay all costs and charges which may accrue in the prosecution of such proceeding or (b) at the option of the petitioner such undertaking may be in a sum sufficient to cover the taxes, interest and penalties stated in such determination plus the costs and charges which may accrue against it in the prosecution of the proceeding, in which event the petitioner shall not be required to pay such taxes, interest or penalties as a condition precedent to the application.

(9) Where any tax imposed hereunder shall have been erroneously, illegally or unconstitutionally collected and application for the refund thereof duly made to the proper fiscal officer or officers, and such officer or officers shall have made a determination denying such refund, such determination shall be reviewable by a proceeding under article seventy-eight of the civil practice act, provided, however, that such proceeding is instituted within thirty days after the giving of the notice of such denial, that a final determination of tax due was not previously made, and that an undertaking is filed with the proper fiscal officer or officers in such amount and with such sureties as a justice of the supreme court shall approve to the effect that if such proceeding be dismissed or the tax confirmed, the petitioner will pay all costs and charges which may accrue in the prosecution of such proceeding.

(10) Except in the case of a wilfully false or fraudulent return with intent to evade the tax, no assessment of additional tax shall be made after the expiration of more than three years from the date of the filing of a return, provided,

however, that where no return has been filed as provided by law the tax may be assessed at any time.

(11) Revenues resulting from the imposition of tax authorized by this act shall be paid into the treasury of any such city and shall be credited to and deposited in the general fund of any such city.

(12) If any provision of this act or [redacted]pplication thereof to any person or circumstance shall be [redacted]d invalid, the remainder of this act and the application of such provision to other persons or circumstances shall not be affected thereby.

§ 2. This act shall take effect June first, nineteen hundred sixty-three, except that local laws may be adopted or amended pursuant to this act before such date to take effect on or after June first, nineteen hundred sixty-three.

APPENDIX D

New York State Constitution, Article VIII, Section 10

Hereafter, in any county, city, village or school district described in this section, the amount to be raised by tax on real estate in any fiscal year, in addition to providing for the interest on and the principal of all indebtedness, shall not exceed an amount equal to the following percentages of the average full valuation of taxable real estate of such county, city, village or school district, less the amount to be raised by tax on real estate in such year for the payment of the interest on and redemption of certificates or other evidence of indebtedness described in paragraphs A and D of section five of this article, or renewals thereof:

(a) any county, for county purposes, one and one-half per centum; provided, however, that the legislature may prescribe a method by which such limitation may be increased to not to exceed two per centum;

(b) any city of one hundred twenty-five thousand or more inhabitants according to the latest federal census, for city purposes, two per centum;

(c) any city having less than one hundred twenty-five thousand inhabitants according to the latest federal census, for city purposes, two per centum;

(d) any village, for village purposes, two per centum;

(e) any school district which is coterminous with or partly within or wholly within, a city having less than one hundred twenty-five thousand inhabitants according to the latest federal census, for school district purposes, one and one-quarter per centum; provided, however, that if the taxes subject to this limitation levied for any such school district for its first fiscal year beginning on or after July first, nineteen hundred forty-seven, were in excess of one

and one-quarter per centum but not greater than one and one-half per centum, then for such school district the limitation shall be one and one-half per centum; or if such taxes were in excess of one and one-half per centum but not greater than one and three-quarters per centum for such fiscal year, then for such school district the limitation shall be one and three-quarters per centum; or if such taxes were in excess of one and three-quarters per centum for such fiscal year, then for such school district the limitation shall be two per centum. The limitation herein imposed for any such school district may be increased by the approving vote of sixty per centum or more of the duly qualified voters of such school district voting on a proposition therefor submitted at a general or special election. Any such proposition shall provide only for an additional one-quarter of one per centum in excess of the limitation applicable to such school district at the time of submission of such proposition. When such a proposition has been submitted and approved by the voters of the school district as herein provided, no proposition for a further increase in such limitation shall be submitted for a period of one year computed from the date of submission of the approved proposition, provided that where a proposition for an increase is submitted and approved at a general election or an annual school election, a proposition for a further increase may be submitted at the corresponding election in the following year. The legislature shall prescribe by law the qualifications for voting at any such election. In the event any such school district shall be consolidated with any one or more school districts, the legislature shall prescribe a limitation, not exceeding two per centum, for such consolidated district. Thereafter, such limitation may be increased as provided in this sub-paragraph (e). In no event shall the limitation for any school district or consolidated school district described in this sub-paragraph (e) exceed two per centum.

(f) Notwithstanding the provisions of sub-paragraphs (a) and (b) of this section, the city of New York and the counties therein, for city and county purposes, a combined total of two and one-half per centum.

The average full valuation of taxable real estate of such county, city, village or school district shall be determined by taking the assessed valuations of taxable real estate on the last completed assessment rolls and the four preceding rolls of such county, city, village or school district, and applying thereto the ratio which such assessed valuation on each of such rolls bears to the full valuation, as determined by the state tax commission or by such other state officer or agency as the legislature shall by law direct. The legislature shall prescribe the manner by which such ratio shall be determined by the state tax commission or by such other state officer or agency.

Nothing contained in this section shall be deemed to restrict the powers granted to the legislature by other provisions of this constitution to further restrict the powers of any county, city, town, village or school district to levy taxes on real estate.

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Supreme Court of the United States

OCTOBER TERM, 1964

No. 152

AMPCO PRINTING-ADVERTISERS' OFFSET CORP., THE KATZ PARKING SYSTEM, INC. and THE GEORGIAN PRESS, INC.,
Plaintiffs-Appellants,

against

THE CITY OF NEW YORK, ROBERT F. WAGNER, as Mayor of the City of New York, ABRAHAM D. BEAME, as Comptroller of said City, and HILDA G. SCHWARTZ, as Director of Finance of said City,
Defendants-Respondents,

LOUIS J. LEFKOWITZ, as Attorney-General of the State of New York,
Intervenor-Respondent.

ON APPEAL FROM THE COURT OF APPEALS OF THE STATE OF NEW YORK

MOTION TO DISMISS APPEAL

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Supreme Court of the United States

OCTOBER TERM, 1963

No. 1185

AMPCO PRINTING-ADVERTISERS' OFFSET CORP., THE KATZ PARKING SYSTEM, INC. and THE GEORGIAN PRESS, INC.,

Plaintiffs-Appellants,

against

THE CITY OF NEW YORK, ROBERT F. WAGNER, as Mayor of the City of New York, ABRAHAM D. BEAME, as Comptroller of said City, and HILDA G. SCHWARTZ, as Director of Finance of said City,

Defendants-Respondents,

LOUIS J. LEFKOWITZ, as Attorney-General of the State of New York,

Intervenor-Respondent.

ON APPEAL FROM THE COURT OF APPEALS OF THE STATE OF NEW YORK

MOTION TO DISMISS APPEAL

Preliminary Statement

The appellants have appealed from a judgment of the Court of Appeals of the State of New York, dated February 20, 1964, unanimously affirming a judgment of the Supreme Court of the State of New York.

The opinion of the Court of Appeals is officially reported in 14 NY 2d 14 and is set forth in Appendix A of the ap-

pellants' jurisdictional statement. The opinion of the Supreme Court is officially reported in 41 Misc 2d 371 and is set forth in the same Appendix A.

By this appeal the appellants challenge the constitutionality of the local law imposing the New York City Commercial Rent or Occupancy Tax and of the New York State enabling act pursuant to which it was adopted. The appellants contend that these laws violate Section One of the Fourteenth Amendment in that, in three different respects, the laws discriminate against the appellants arbitrarily and capriciously.

The appellees, other than the Intervenor, move to dismiss the appeal on the ground that it does not present a substantial federal question.

Statutes Involved

The statute authorizing the local tax law and the local law imposing the tax are set forth in Appendix C of appellants' jurisdictional statement.

Statement of the Case

This is an action brought by the appellants for a declaratory judgment declaring that the State enabling act and the local law imposing the New York City Commercial Rent or Occupancy Tax are unconstitutional and invalid on the ground that they violate several provisions of the New York State Constitution and Section One of the Fourteenth Amendment of the Federal Constitution. After issue was joined, both sides moved for summary judgment.

The trial court denied appellants' motion, granted appellees' motion, and declared that both the enabling act and

the local law were valid and constitutional. Upon a direct appeal the New York Court of Appeals unanimously affirmed. Both courts wrote opinions.

Facts

(1)

The complaint alleges, so far as relevant, that: The appellant Ampco Printing-Advertisers' Offset Corp. is engaged in the color lithography and printing business on leased premises in New York City and pays rent in excess of $2500 per annum; and that it competes with other persons in the same business who own the premises they use for such activity. The appellant Katz Parking System, Inc., operates a public parking business in the City on premises in the City for which it pays rent in excess of $2500 per annum; and it competes with other persons who own the premises they use for such activity and with the City of New York. The appellant Georgian Press, Inc., is the owner of premises in the City which it rents to commercial tenants, all of whom pay rent in excess of $2500 per annum.

The affidavits in support of appellants' motion for summary judgment reiterate these factual allegations. They are not disputed in the affidavit supporting the appellees' motion for summary judgment.

The complaint contains an allegation that the enabling act and the local law violate the Fourteenth Amendment, Section One, in that they arbitrarily, capriciously, unreasonably and wrongfully discriminate against the appellants and others similarly situated in that they are taxed at the rate of 5% of their rent while: (1) the City of New York and others engaged in the same commercial activity who

own the premises used for such activity are not subject to the tax; (2) other tenants who are subject to the tax, but who have a base rent not in excess of $2,500 per annum, are taxed at the rate of 2½% of the rent; and (3) tenants who rent for residential purposes are not subject to the tax.

(2)

In the trial court the appellants' memorandum of law urged all three grounds of asserted discrimination. In the New York Court of Appeals the appellants' brief confined its discussion of the Fourteenth Amendment to only one of these grounds—the one concerning discrimination against tenants as contrasted with owner occupants of real property engaged in the same business. At page 56 of their brief in the New York Court of Appeals the appellants stated:

> "In the opinion below, the learned Justice at Special Term mentions (39) three grounds on which it was claimed that the occupancy tax is unconstitutionally discriminatory. It is of interest to note that although he specifically discusses the other two grounds urged in the court below (opinion, 39-41), *he wholly refrains from discussing the sole ground urged here, viz., the discrimination between owner occupied and tenant occupied property.*" (Emphasis ours.)

ARGUMENT

A tax which is applicable to tenants occupying premises for carrying on any business or commercial activity, measured by a percentage of the rent paid for such use or occupancy, does not violate the due process clause or the equal protection clause of the Fourteenth Amendment merely because it is inapplicable to owners of premises who occupy them to carry on similar businesses or commercial activities. Nor are these constitutional provisions violated (a) because the tax law applies a lower rate of tax to tenants whose annual rent is $2,500 or less (b) or because the tax does not apply to residential tenants.

(1)

A tax need not follow a pattern of rigid uniformity. *Bell's Gap Railroad Co.* v. *Pennsylvania*, 134 U.S. 232, 237 (1890); *Allied Stores of Ohio* v. *Bowers*, 358 U.S. 522, 526-529 (1959). A wide discretion may be exercised in selecting those subject to the tax or in making other classifications. *New York Rapid Transit Corp.* v. *City of New York*, 303 U.S. 573, 578 (1938). It has been said that "in taxation there is a broader power of classification than in some other exercise of legislation." *Citizens' Telephone Co.* v. *Fuller*, 229 U.S. 322, 329 (1913).

(2)

While there appear to be no cases directly in point on the question of the validity of a tax imposed on tenants engaged in commercial activities which does not apply to owners who engaged in such activities on their own prem-

ises, there are closely analogous cases which show that such a tax is constitutional.

In *Singer Sewing Machine Co.* v. *Brickel*, 233 U.S. 304, 315 (1914), a tax was upheld although it applied to the selling of sewing machines from a delivery wagon and was not imposed on those selling such machines at an established place of business. In *Hart Refineries* v. *Harmon*, 278 U.S. 499, 503 (1929), it was held that a tax may be imposed on the sale of a product without taxing the use of the same product.

Manufacturers selling their own products may be excepted from a tax on merchants selling the same products. *Armour & Co.* v. *Virginia*, 246 U.S. 1 (1918). In *Broad River Power Co.* v. *Query*, 288 U.S. 178 (1933), an exemption of industrial plants generating electric power for their own use from a tax on the generation of electricity was sustained. An exemption from a motor vehicle tax may be provided for those vehicles carrying agricultural and dairy products so long as title to the products remains in the producer. *Aero Transit Co.* v. *Georgia Comm'n*, 295 U.S. 285, 290 (1935). Nor is it improper to tax the occupation of refining sugar and molasses although the tax is inapplicable to planters refining their own sugar. *American Sugar Refining Co.* v. *Louisiana*, 179 U.S. 89 (1900).

In light of these and other cases it is evident that the distinction between owners and tenants drawn by the present tax law is not to be deemed capricious. The Legislature may have proceeded on the view that an owner who pays a direct tax on his real property should not also be subjected to this tax. *Klein* v. *Board of Supervisors*, 282 U.S. 19 (1930). Cf. *Alaska* v. *Arctic Maid*, 366 U.S. 199, 204-205 (1961). The appellants anticipated that this might be suggested as one of the reasonable bases for the legislative action, but they make no attempt to meet it squarely. In

stead they confine themselves to an assertion that the appellees conceded in the Court below that the real estate tax is absorbed by the rent paid by tenants and that the economic impact of a real estate tax and a tax on occupancy are identical (Juris. St., pp. 8-9).

This "concession" is based upon page 22 of our brief in the Court of Appeals. In answer we simply quote what we said on that page:

> "We shall assume the economic soundness of this argument. The Courts, however, have consistently refused to accept such an economic argument as a basis for construing constitutional provisions."

Thereafter, we quoted from *Chicago & N.W. Ry. Co.* v. *State*, 128 Wisc. 553, 108 N.W. 557, 562-563 (1906), and *Alabama* v. *King & Boozer*, 314 U.S. 1, 8-9 (1941), and cited *Curry* v. *United States*, 314 U.S. 14, 18 (1941), and *Esso Standard Oil Co.* v. *Evans*, 345 U.S. 495, 499 (1953). We concluded by showing that acceptance of appellees' economic impact theory would lead to bizarre results.

Another valid reason for the distinction drawn between tenants and owners of premises on which they engage in commercial activities may have been the danger that, if the owners were taxed, the law would be held unconstitutional as violative of the New York State constitutional provision limiting the amount to be raised by tax on real estate. The law makers may have feared that a tax on owner-occupants of real estate based on the rental value of the premises occupied would be held to be a tax on real estate even though the tax was confined to those engaged in commercial activities.

The equal protection clause is never violated when the failure to tax a group asserted to be similar to those who are taxed is based on a constitutional bar against taxing

the exempted group. *Union Bank & Trust Co.* v. *Phelps*, 288 U.S. 181, 186-187 (1933); *Packer Corporation* v. *Utah*, 285 U.S. 105, 109-110 (1932). In the case of *Raley & Bros.* v. *Richardson*, 264 U.S. 157 (1924), the Court said (p. 160):

> "It would be a strange application of the equality provision of the Fourteenth Amendment to say that because a State is forbidden by paramount law to impose a tax upon some merchants, it is therefore powerless to impose it upon other merchants to whom the restriction does not apply. It is enough if the State observe the rule of equality among the persons subject to its taxing power."

The appellants urge that these cases are not in point because they relate to an absolute bar against taxation while the State constitutional provision involved merely limits the total amount of tax on real estate. This constitutional limitation, however, could have been as effective a bar against raising revenue by imposing the tax on owner occupants as an absolute prohibition. The appellants' complaint alleged (and the answer admitted) that the real estate tax would amount to $800,331,977 and that the State Constitution limited tax on real estate to an amount which exceeded this sum by only $571,667 (Rec. on App., pp. 23-24). There is no doubt that, if the tax were extended to owner occupants and if the State constitutional limitation were held applicable, the tax law would have been invalidated.

(3)

In *Rast* v. *Van Deman & Lewis*, 240 U.S. 342 (1916), the Court said (p. 357):

> "It is established that a distinction in legislation is not arbitrary, if any state of facts reasonably can be conceived that would sustain it, and the existence of that

> state of facts at the time the law was enacted must be assumed. *Lindsley* v. *Natural Carbonic Gas Co.*, 220 U.S. 61, 78. It makes no difference that the facts may be disputed or their effect opposed by argument and opinion of serious strength."

In *Carmichael* v. *Southern Coal Co.*, 301 U.S. 495 (1937), it was pointed out that when a legislature adopts a tax (p. 510):

> "* * * courts cannot assume that its action is capricious, or that, with its informed acquaintance with local conditions to which the legislation is to be applied, it was not aware of facts which afford reasonable basis for its action."

See, also, *Madden* v. *Kentucky*, 309 U.S. 83, 88 (1940).

CONCLUSION

The appeal from the judgment of the Court of Appeals of the State of New York should be dismissed.

June 23, 1964.

Respectfully submitted,

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Supreme Court of the United States

October Term, 1963

No. [redacted] 152

AMPCO PRINTING-ADVERTISERS' OFFSET CORP., THE KATZ PARKING SYSTEM, INC. and THE GEORGIAN PRESS, INC.,

Plaintiffs-Appellants,

against

THE CITY OF NEW YORK, ROBERT F. WAGNER, as Mayor of the City of New York, ABRAHAM D. BEAME, as Comptroller of said City, and HILDA G. SCHWARTZ, as Director of Finance of said City,

Defendants-Respondents.

LOUIS J. LEFKOWITZ, as Attorney-General of the State of New York,

Intervenor-Respondent.

On Appeal from the Court of Appeals of the State of New York

APPELLANTS' REPLY BRIEF

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Supreme Court of the United States

October Term, 1963

No. 1185

AMPCO PRINTING-ADVERTISERS' OFFSET CORP., THE KATZ PARKING SYSTEM, INC. and THE GEORGIAN PRESS, INC.,
Plaintiffs-Appellants,

against

THE CITY OF NEW YORK, ROBERT F. WAGNER, as Mayor of the City of New York, ABRAHAM D. BEAME, as Comptroller of said City, and HILDA G. SCHWARTZ, as Director of Finance of said City,
Defendants-Respondents.

LOUIS J. LEFKOWITZ, as Attorney-General of the State of New York,
Intervenor-Respondent.

ON APPEAL FROM THE COURT OF APPEALS OF THE STATE OF NEW YORK

APPELLANTS' REPLY BRIEF

The principal questions involved in this appeal have been covered in appellants' jurisdictional statement. We submit this reply brief only to comment on several points in defendants-respondents' motion to dismiss appeal, which challenge reply.

Of the cases cited by defendants-respondents in the two complete paragraphs on page six of their motion to dismiss appeal in support of their contentions that (1) the

distinction between owners and tenants drawn by the present tax law is not capricious and (2) the instant tax is constitutional, the following are, we submit, clearly inapposite to the case at bar: *Singer Sewing Machine Co.* v. *Brickell*, 233 U. S. 304 (1914); *Hart Refineries* v. *Harmon*, 278 U. S. 499 (1929); *Armour & Co.* v. *Virginia*, 246 U. S. 1 (1918).

The remainder of the cited cases, we submit, are also not analogous to the instant case and do not support the contentions of defendants-respondents for which they are cited. Unlike the classification—founded upon the distinction between owners and tenants—involved in the case at bar, the classifications in those cases were founded basically on a distinction between a tax on the property, or the holding, manufacturing, producing, or processing of property which is primarily to be sold, as distinguished from that which is not to be sold, to customers of the taxpayer in the ordinary course of his trade or business, as of the time of the imposition of the tax.

Above all else, it is clear from a reading of the above-cited cases that they do not resolve and dispose of the issues presented by this appeal. This conclusion, which is the very essence of appellants' jurisdictional statement, it would seem, is sufficient to satisfy the requirement that an appeal to this Court presents a substantial Federal question.

On the same page (p. 6) of their brief, defendants-respondents set forth the following conjecture as a basis for the classification involved herein:

> "The Legislature may have proceeded on the view that an owner who pays a direct tax on his real property should not also be subjected to this tax. *Klein* v. *Board of Supervisors*, 282 U. S. 19 (1930). * * *"

In the *Klein* case, the Court upheld a Kentucky tax imposed on holders of shares of stock in a corporation,

but excluded from its coverage shares of stock of individual stockholders of a corporation, at least 75% of whose total property was taxable in Kentucky, so long as the corporation paid taxes on all its property in Kentucky. The *Klein* case does not support the argument made by defendants-respondents in the above quoted sentence. Unlike the suggestion made by defendants-respondents in the instant case that a single individual, *viz.*, an owner of real property, ought not to be burdened by an occupancy tax in addition to a direct tax on his real property, the Court in the *Klein* case makes it clear beyond peradventure that it is dealing with two different entities: a corporation as distinguished from its shareholders; and incidentally, two different properties: the property of the corporation and the shares of the stockholders.

On page 7 of their motion to dismiss appeal defendants-respondents deny having made a concession in their brief in the Court of Appeals that the real estate tax is absorbed by the rent paid by tenants, and that the economic impact of a real estate tax and of a tax on occupancy are identical. Appellants have never asserted that any such concession was made by defendants-respondents in their brief. In their brief the defendants-respondents merely assumed the correctness of these propositions for the purpose of argument. But defendants-respondents in their oral argument in the Court of Appeals went further and actually conceded the correctness of these propositions. Defendants-respondents do not deny this. Nor do they deny that in fact the economic impact of a real estate tax and the economic impact of the tax at bar are identical.

On the same page (p. 7) of their motion to dismiss this appeal, defendants-respondents state:

> "We concluded [that portion of the argument in our brief to the Court of Appeals] by showing that acceptance of appellees' [appellants'] economic impact theory would lead to bizarre results."

It may be noted briefly that this statement was framed in the context of an argument based upon the New York Constitution (referred to in appellants' jurisdictional statement at page 9) which is not before this Court. This statement in no way related, and its inclusion in defendants-respondents' motion to dismiss appeal is wholly irrelevant, to the issues presented by this appeal.

The questions presented by this appeal are substantial and they are of public importance. This Court should, we submit, note probable jurisdiction of the case.

Respectfully submitted,

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Dated: July 9, 1964,
New York, N. Y.

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Supreme Court of the United States

OCTOBER TERM, 1963

N[redacted] 152

AMPCO PRINTING-ADVERTISERS' OFFSET CORP., THE KATZ PARKING SYSTEM, INC. and THE GEORGIAN PRESS, INC.,

Plaintiffs-Appellants,

against

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Defendants-Appellees,

LOUIS J. LEFKOWITZ, as Attorney General of the State of New York,

Intervenor-Appellee.

BRIEF OF ATTORNEY GENERAL INTERVENOR-APPELLEE

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Supreme Court of the United States

OCTOBER TERM, 1963

No. 1185

AMPCO PRINTING-ADVERTISERS' OFFSET CORP., THE KATZ PARKING SYSTEM, INC. and THE GEORGIAN PRESS, INC.,

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against

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Defendants-Appellees,

LOUIS J. LEFKOWITZ, as Attorney General of the State of New York,

Intervenor-Appellee.

BRIEF OF ATTORNEY GENERAL INTERVENOR-APPELLEE

Preliminary Statement

The appellants have appealed from a judgment of the Court of Appeals of the State of New York, dated February 20, 1964, unanimously affirming a judgment of the Supreme Court of the State of New York.

The opinion of the Court of Appeals is officially reported in 14 N. Y. 2d 11, 197 N. E. 2d 285, and is set forth in Appendix A of the appellants' jurisdictional statement. The opinion of the Supreme Court is reported in 41 Misc. 2d 371, 245 N.Y.S. 2d 121 and is set forth in the same Appendix A.

By this appeal the appellants challenge the constitutionality of Chapter 257 of the Laws of 1963 of the State of New York, the Enabling Act for the New York City Commercial Rent or Occupancy Tax, and the local law imposing such tax. The appellants contend that these laws violate Section One of the Fourteenth Amendment in that they arbitrarily and capriciously discriminate against appellants.

The City of New York *et al.*, defendants-appellees, have moved to dismiss this appeal on the ground that no substantial federal question is preesnted.

The Attorney General of the State of New York, intervenor-appellee, moves, joins in and supports the motion of the defendants-appellees to dismiss this appeal on the ground that no substantial federal question is presented.

Statutes Involved

Said Chapter 257 of the Laws of 1963 of the State of New York and said local law imposing the tax herein are set forth in Appendix C of appellants' jurisdictional statement.

Statement of the Case

This is an action brought by the appellants for a declaratory judgment declaring that the aforesaid State Enabling Act and the local law imposing the New York City Commercial Rent or Occupancy Tax were unconstitutional and invalid on the ground that they violated several provisions of the New York State Constitution and Section One of the

Fourteenth Amendment of the Constitution of the United States. The Attorney General of the State of New York was permitted to intervene pursuant to New York C.P.L.R. § 1012 (b) and New York Executive Law § 71 (McKinney's Bk. 18) on the ground that the constitutionality of a state statute (the Enabling Act) was involved. After issue was joined, all parties moved for summary judgment.

The State Supreme Court denied appellants' motion, granted appellees' motion, and declared that both the said Enabling Act and the local law are valid and constitutional. Upon a direct appeal the New York Court of Appeals unanimously affirmed.

For a statement of the facts, the Court is respectfully referred to the motion to dismiss this appeal filed by the defendants-appellees City of New York and City officials (Br. pp. 3-4).

Argument

A state may authorize a local tax which is applicable to private tenants occupying premises for carrying on any business or commercial activity, and such tax, measured by a percentage of the rent paid for such use or occupancy, does not violate the due process clause or the equal protection clause of the Fourteenth Amendment merely because it is inapplicable to the City and to private owners of premises who may occupy them to carry on similar businesses or commercial activities and who are otherwise taxed. Nor are these constitutional provisions violated (a) because a lower rate of tax is applied to private tenants whose annual rent is $2,500 or less, or (b) because the tax does not apply to private residential tenants. There is no substantial federal question presented in this connection.

The appellants contend, in their jurisdictional statement, pages 7-10, that the New York City Commercial Rent or Occupancy Tax discriminates unconstitutionally against

them, in that such tax does not also apply to owners of business real estate.

However, owners are otherwise taxed. Different taxpayers may be taxed differently and a state may make or permit classifications for the purposes of taxation. *Walters* v. *City of St. Louis*, 347 U. S. 231 (1954); *Caskey Baking Co.* v. *Virginia*, 313 U. S. 117 (1941); *New York Rapid Transit Corp.* v. *City of New York*, 303 U. S. 573 (1938). As stated in the *Walters* case, *supra*, at page 237:

> "• • • Equal protection does not require identity of treatment. • • •"

As was further stated in the *Caskey* case, *supra*, at page 121:

> "• • • As we have repeatedly held, the equal protection clause of the Fourteenth Amendment does not prevent a state from classifying businesses for taxation or impose any iron rule of equality. Some occupations may be taxed though others are not. Some may be taxed at one rate, others at a different rate. Classification is not discrimination. • • •".

It is believed that the proper rule is stated in *Allied Stores of Ohio, Inc.* v. *Bowers*, 358 U. S. 522 (1959), at page 526, as follows:

> "• • • When dealing with their proper domestic concerns, and not trenching upon the prerogatives of the National Government or violating the guaranties of the Federal Constitution, the States have the attribute of sovereign powers in devising their fiscal systems to ensure revenue and foster their local interests. Of course, the States, in the exercise of their taxing power, are subject to the requirements of the Equal Protection Clause of the Fourteenth Amendment. But that clause imposes no iron rule of equality, prohibiting the flexibility and variety that are appropriate to reasonable schemes of state taxation. • • •"

Some may be taxed, though others are not. *New York Rapid Transit Corp.* v. *City of New York, supra; Allied Stores of Ohio, Inc.* v. *Bowers, supra; United States* v. *Department of Revenue of State of Illinois*, 371 U. S. 21 (1962), *affirming*, 202 F. Supp. 757 (N. D. Ill., 1962). Even competitors may be taxed, or not taxed, in different ways. *New York Rapid Transit Corp.* v. *City of New York, supra*, at page 580 (private rapid transit lines taxed, City rapid transit lines and taxicabs not taxed, permissible).

In *Rockwell Spring and Axle Co.* v. *Romulus Township*, 365 Mich. 632, 114 N. W. 2d 166 (Mich. Sup. Ct., 1962), the taxation of private lessees from a County airport, though private lessees from a State University airport were not taxed, was upheld by the Michigan court.

States and municipalities have traditionally directly taxed, substantially, the owners of real estate, and regardless of whether such owners have any income from the real estate. It is submitted that they may now turn around and tax lessees, who generally have, as such, heretofore been exempted. The ultimate burden of all such taxes, if imposed on business premises, may be on the ultimate consumers. It is not necessarily the lessees who finally bear the burden.

Tenants presumably have elected to be such because they did not wish to bear the direct burdens and risks of ownership, even though the landlord's profits may be part of their costs of doing so. The State has now permitted the City to add another cost of leasing.

Because of State constitutional limitations on further direct taxation of real estate owners, the State has now permitted the respondent City, rather than add additional direct burdens upon owners, to tax lessees. Owners, if they fail to pay their real estate taxes, through lack of income or otherwise, face the loss of their property, which may be substantial. In depression times, or in the case of an unsuccessful business operation, this may often occur.

It has not been shown that owners are always favored in the entire scheme of State and local taxation.

The Court is respectfully referred to the numerous cases cited by the Corporation Counsl in his motion, sustaining the validity of this tax.

This tax is constitutional and no substantial federal question is presented by this appeal. See *Vaughan* v. *State of New York*, 272 N. Y. 102, 5 N. E. 2d 53 (1936), *appeal dismissed for want of a substantial federal question*, 300 U. S 638 (1937).

CONCLUSION

The appeal from the judgment of the Court of Appeals of the State of New York should be dismissed.

Dated: New York, New York, July 13, 1964.

Respectfully submitted,

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Supreme Court of the United States

October Term, 1963

No. [redacted]152

AMPCO PRINTING-ADVERTISERS' OFFSET CORP., THE KATZ PARKING SYSTEM, INC. and THE GEORGIAN PRESS, INC.,

Plaintiffs-Appellants,

against

THE CITY OF NEW YORK, ROBERT F. WAGNER, as Mayor of the City of New York, ABRAHAM D. BEAME, as Comptroller of said City, and HILDA G. SCHWARTZ, as Director of Finance of said City,

Defendants-Respondents.

LOUIS J. LEFKOWITZ, as Attorney-General of the State of New York,

Intervenor-Respondent.

On Appeal from the Court of Appeals of the State of New York

APPELLANTS' BRIEF IN REPLY TO THE BRIEF OF THE ATTORNEY-GENERAL OF THE STATE OF NEW YORK, INTERVENOR-RESPONDENT

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Supreme Court of the United States

October Term, 1963

No. 1185

AMPCO PRINTING-ADVERTISERS' OFFSET CORP., THE KATZ PARKING SYSTEM, INC. and THE GEORGIAN PRESS, INC.,
Plaintiffs-Appellants,

against

THE CITY OF NEW YORK, ROBERT F. WAGNER, as Mayor of the City of New York, ABRAHAM D. BEAME, as Comptroller of said City, and HILDA G. SCHWARTZ, as Director of Finance of said City,
Defendants-Respondents.

LOUIS J. LEFKOWITZ, as Attorney-General of the State of New York,
Intervenor-Respondent.

ON APPEAL FROM THE COURT OF APPEALS OF THE STATE OF NEW YORK

APPELLANTS' BRIEF IN REPLY TO THE BRIEF OF THE ATTORNEY-GENERAL OF THE STATE OF NEW YORK, INTERVENOR-RESPONDENT

The principal questions in the case have already been dealt with in appellants' jurisdictional statement and appellants' reply brief. This brief deals only with such matters in intervenor-respondent's brief (which was not filed until after appellants' reply brief had been filed) as we deem to require additional reply.

Of the cases cited by intervenor-respondent on pages 4 and 5 of his brief, the following cases (*Walters* v. *City*

of St. Louis, 347 U. S. 231 (1954); *Caskey Baking Co.* v. *Virginia*, 313 U. S. 117 (1941); *Allied Stores of Ohio, Inc.* v. *Bowers*, 358 U. S. 522 (1959); *United States* v. *Department of Revenue of State of Illinois*, 202 F. Supp. 757 (N. D. Ill. 1962), *aff'd per curiam*, 371 U. S. 21 (1962)) are, we submit, wholly inapplicable to the case at bar. They are relevant to the instant case only to the extent that they support the proposition that classification for the purposes of legislation must be reasonable, not arbitrary, and must rest upon some ground of difference having a fair and substantial relation to the object of the legislation, so that all persons similarly circumstanced shall be treated alike—a proposition which, of course, we do not question.

The remainder of the cited cases, we submit, are also not relevant to the instant case. In *New York Rapid Transit Corp.* v. *City of New York*, 303 U. S. 573 (1938), this Court upheld the constitutionality of a classification incorporated in a tax levied upon "utilities," which, as defined therein, included a regulated private rapid transit railroad, but did not include, e.g., taxicabs and transit lines operated by a municipality. The regulated nature of that taxpayer and the reasons peculiar thereto set forth by this Court (at 580, 581) in support of the classification there involved clearly distinguish that case from the case at bar.

Rockwell Spring and Axle Co. v. *Romulus Township*, 365 Mich. 632, 114 N. W. 2d 166 (1962), cited at page 5 of the Attorney-General's brief, involves solely a distinction between lessees of tax-exempt land. Specifically, lessees of county owned tax-exempt land were subject to the tax, while lessees of land owned by state-supported educational institutions were not. That case plainly has no bearing on the issues presented in the case at bar.

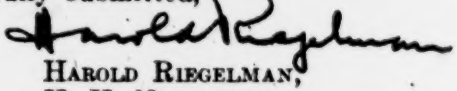
Above all else, it is clear from a reading of the above-cited cases that they do not resolve or dispose of the issues presented by this appeal.

The suggestion in the first sentence of the last (incomplete) paragraph on page 5 of the Attorney-General's brief, is, we submit, disposed of at pages 9 *et seq.* of appellants' jurisdictional statement.

Vaughan v. *State of New York*, 272 N. Y. 102, 5 N. E. 2d 53 (1936), *appeal dismissed per curiam*, 300 U. S. 638 (1937), cited by intervenor-respondent on page 6 of his brief, is wholly irrelevant to the instant issue.

The questions presented by this appeal are substantial and they are of public importance. This Court should, we submit, note probable jurisdiction of the case.

Respectfully submitted,



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Dated: September 2, 1964,
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